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MILITARY LAW REVIEW—VOL. 85

SYMPOSIUM ON ADMINISTRATIVE AND CIVIL LAW: INTRODUCTION

In this volume the *Military Law Review* continues the series of symposia on specialized areas of military law which commenced with volume 80. With this volume, also, one cycle of those symposia has been completed: Each of the four major areas of military law—criminal law, contract law, international law, and now administrative and civil law—has been the subject of at least one volume of the *Review*.

The label "administrative and civil law" encompasses two separate but overlapping areas of law. Administrative law concerns the internal functioning of the government, while civil law (in a common-law context) focusses on the private interests and transactions of individuals. The articles in the present volume deal primarily with various aspects of civil law as it affects particularly military personnel and their dependents. Subject to availability of suitable articles or other writings, the *Military Law Review* may present a volume on administrative law during the next year. Thus, the present volume may be considered the first part of a nonconsecutive two-part symposium on administrative and civil law.

The first two articles in this issue deal with problems of taxation peculiar to military service. These articles should be helpful particularly to legal assistance officers. However, they will be of interest also to every military attorney interested in rational, far-sighted family financial planning.

Major Lancaster's article discusses the probate laws of the various states, and the effects these laws can have on military families with property and citizenship scattered among several states. The article is supplemented by extensive appendices setting forth information about will execution requirements and related matters, state by state.

Shifting our attention from estate planning to ways and means of holding onto current income, Lieutenant Colonel Cummins discusses legislation of the past few years which has made possible the withholding of state and local taxes from military pay. As in the case of probate, income tax liability can be a complex and confusing matter because of doubt concerning an individual's state of residence, domicile, or citizenship. Colonel Cummins concludes with a recommendation that individuals take affirmative steps to clarify their residence if any doubt exists.

In addition to taxation, there may be other ways in which military income might be reduced. Captain Petersen discusses the case of *United States v. Larionoff*, in which certain servicemembers complained that they were improperly denied variable reenlistment bonuses. The Supreme Court agreed with them, in a decision handed down in 1977. Captain Petersen asks whether the Court based this decision on a perceived denial of fifth amendment due process. He answers his own question in the negative, concluding that the decision was consistent with the real though unarticulated intention of Congress.

In the early decades of United States history, the judge advocates general were concerned only with matters of military justice and discipline. How did they come to be advisors on a seemingly limitless range of questions within the scope of administrative and civil law? Captain Hoffman describes this process of bureaucratic evolution in a short article built upon official correspondence and other documents issued between 1851 and 1880.

We are fortunate in having, in addition to the four articles described above, five book reviews, all of which relate in some way to the theme of this issue. Lieutenant Colonel Schmidt reviews *Crisis in Command—Mismanagement in the Army*, dealing with defects in American military leadership brought out by the experiences of the Vietnam war. Major Coupe examines a treatise which could be helpful to labor law advisors assigned to United States Army, Europe. Colonel McInerny comments on a study of the possible evidences and effects of racial discrimination on the administration of military justice within the Marine Corps: an example of one of the many points at which administrative and civil law, concerned with equal opportunity, makes contact with other areas of law such as military justice. *Confession and Avoidance*, reviewed by Cap-

tain(P) Rehyansky, is the autobiography of Leon Jaworski, who, best known for his role as Watergate prosecutor, served as a judge advocate many years ago, working on the Nuremberg cases after World War II. Finally, Captain Davidson reviews *Big Story*, an account of slanted news coverage of the Tet offensive of 1968, and he offers some observations concerning the problems of restricting news reporting in future wars.

Administrative and civil law covers a wide range of subjects indeed, and this is shown by the diversity of topics discussed in the writings which comprise this symposium issue.

PERCIVAL D. PARK
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PROBATE AND THE MILITARY: WHAT'S IT ALL ABOUT?*

Major Steven F. Lancaster**

In this article, Major Lancaster reviews the probate laws of the various States in light of the peculiar problems faced by military families, who routinely have diversity of citizenship within one family, and property scattered over several states.

Appended to the article are tabular analyses of the requirements of the various States for valid execution of wills, and related matters, for the use of legal assistance officers engaged in estate planning.

I. INTRODUCTION

Judge advocate officers serving as legal assistance officers are often asked by their clients to explain probate and to help them avoid it. At the same time many clients are concerned with the validity of their wills and the effect that being in the Amed Forces has on their ability to determine the distribution of their assets at death. The answers to these questions are not always easily or quickly reached.

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* The opinions and conclusions expressed in this article are those of the author and do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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In answering this type of inquiry the legal assistance officer must decide what probate laws apply to his client's estate, whether probate will be required, with what will-execution laws the client must comply, how probate will affect the client's estate, and what he can do to help his client to avoid probate or to make it as simple a procedure as possible..

The purpose of this article is to aid legal assistance officers in answering their clients' questions about probate and wills. This is accomplished by reviewing the law of wills and the law of probate, summarizing the various state laws governing them, and proposing a standard procedure for will execution. The purpose and effect of the Uniform Probate Code will be discussed and a recommendation for simplifying will and probate law as related to military personnel will be offered.

In pursuing the above purposes the reader is asked to consider the following words of Mr. Justice Holmes:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[1]

II. IN THE BEGINNING

A legal assistance client who asks about probate is usually in the process of having a will prepared. It is also at this time that the legal assistance officer becomes concerned about the various state will and probate laws. For these reasons the problems surrounding wills and will drafting will be discussed first.

A. HISTORY OF WILLS

The use of a will as a means of disposing of title to property, both real and personal, at death, developed as a part of the English

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[1] Holmes, *The Path of the Law*, 10 Harv. L. Rev. 469 (1897).

common law. Its modern development can be traced back to the English Statute of Frauds.[2] The Statute of Frauds required a written will to dispose of title to land but not to dispose of personal property.[3] Some one hundred fifty years later the English Wills Act was enacted.[4] This statute set forth the procedural steps necessary to follow in preparing a will disposing not only of real property but also of personal property.[5]

All fifty states have passed legislation which generally follows the basic procedural rules outlined in the English Statute of Frauds and the Wills Act.[6] The word "generally," as used above, correctly describes the problem created by each state passing its own legislation which sets out the requirements for a valid will. The statutes vary substantially from state to state as to testamentary capacity, age of testator, type of will, number of witnesses, and availability of self-proving clauses.

B. PROBLEM CREATED

Because of variations in state statutory requirements for execution of a valid will, the following question is often asked: Is the will

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[2] E. Scoles & E. Halback, Jr., *Problems and Materials on Decedents' Estates and Trusts* 100 (2d ed. 1973).

[3] Statute of Frauds, 1677, 29 Car. II, c. 3, sec. V, which reads as follows:

> [A]11 devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the Custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of non [sic] effect.

[4] E. Scoles & E. Halback, Jr., *supra* note 2, at 100.

[5] Wills Act, 1837, 7 Wm. IV and 1 Vict., c. 26, sec. IX, which states in relevant part:

> [N]o will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; [that is to say,] it shall be signed at the Foot or End thereof by the Testator, or by some other Person in his Presence and by his Direction; and such signature shall be made or acknowledged by the Testator in the Presence of Two or More Witnesses present at the same Time, and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator, but no Form of Attestation shall be necessary.

[6] E. Scoles & E. Halback, Jr., *supra* note 2, at 100, where it is stated, "except that all American statutes like the English Wills Act, treat real and personal property alike so far as attested wills are concerned."

I am now executing going to be valid in my domiciliary state, in all states, or only in this state?[7] The answer to this question is critical when it is considered what is meant by probate. A more detailed discussion of probate is given later in this article; but for now, let it suffice to say that the first step in a probate proceeding is to determine the validity of any existing will.

The common law rule is to determine the validity of a will disposing of land based on the law of the situs of the land[8] and the validity of a will disposing of personal property based on the law of the decedent's domicile at death.[9] The consequence of this common law rule is graphically illustrated in the case of *French v. Short*.[10] In that case the decedent was a Florida domiciliary when he died, owning real and personal property in both Virginia and Florida. He left a holographic will[11] which the Florida court refused to admit to probate because it did not meet the requirements of the Florida Statute of Wills. The same holographic will was offered for probate in Virginia and accepted by the court in probate to determine the disposition of the real estate located in Virginia. Under Virginia law the holographic will was a valid will. The court in Virginia did not admit the holographic will for the purpose of determining the disposition of personal property located in Virginia, ruling that Florida law governed the validity of a will disposing of personal property of a domiciliary of Florida.

This case points out the uncertainty which the common law rule creates for a military testator who is domiciled in one state, lives in another state, and owns land in still another. To insure that a servicemember's will meets the statutory requirements to be accepted as valid and admitted into probate, the legal assistance officer must know in what state the servicemember is domiciled, the location of any real property, and the state in which the servicemember is as-

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[7] L. Averill, Uniform Probate Code in a Nutshell 72 (1978).

[8] Restatement (Second) of Conflict of Laws sec. 239 (1971). "Rule is applicable to questions relating to capacity of person to make will, formal validity of will, required form of will, and manner of execution." *Id.*, Comment a.

[9] E. Scoles & E. Halback, Jr., *supra* note 2, at 107.
[10] 207 Va. 548, 151 S.E. 2d 354 (1966).
[11] "A will or deed written entirely by the testator or grantor with his own hand." Black's Law Dictionary 865 (Rev. 4th ed. 1968).

signed. He must then check the laws of each of these states for executing wills and be sure to comply with them when preparing and executing the will. When this is accomplished he may then tell the servicemember, with some degree of confidence, where the will he has prepared and the servicemember has executed is valid and will be admitted into probate.

Appendix I consists of a table which summarizes the general procedural rules required to execute a valid will in each state and the District of Columbia. Covered in the chart are requirements for age of testator, testamentary capacity, signature, and number of witnesses, and also where there is provision for a self-proving clause.[12] The table points out the differences in state laws for executing a will. Legal assistance officers can use this table as a starting point in determining what is required to prepare and execute a valid will for servicemembers.

Some states have modified the common law rule discussed above and simplified the problem. This has been accomplished by permitting a will which has been admitted to probate in another state to be admitted into probate in the local courts, if either of two conditions is satisfied.

The will must have been executed according to the statutory requirements of either the state where the will was executed, or the state of the testator's domicile at the time the will was executed.[13] Unfortnately, this does not appear to be the general rule found in most states, and it should not be relied upon by the legal assistance officer in deciding what makes a will valid in a particular state.

C. SUGGESTED WILL EXECUTION PROCEDURE

From the above discussion it is apparent that a legal assistance officer must know more than the formal requirements for executing a will in the state in which he is practicing in order to prepare a will

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[12] In preparing the charts found in the appendices to this article, the author has relied not only on the individual state statutes but also on the summary of state statutes found in 1 Wills, Est., Tr. (P-H) para. 1001.

[13] Wyo. Stat. sec. 2-4-233.

valid for all purposes for a servicemember.[14] One approach to answering this question is by checking the laws of the states where the client is domiciled, where he owns real property, and where he is stationed, as suggested in the proceding section, and then taking care to comply with all of their will execution statutes.

This procedure is time consuming because many servicemembers own real property in several states. It is difficult because most legal assisstance officers do not have ready access to the will execution statutes of all 50 states.

The following will execution procedure is suggested as a more reasonable solution to the problem. This procedure complies minimally with the requirements of all 50 States. It is assumed that each client possesses the requisite mental capacity to make and execute a will. The procedure is as follows:

1. The legal assistance officer should obtain the servicemember's age and check whether the minimum state age is met.[15]

2. The legal assistance officer should insure that the servicemember recognizes the need for a written will.

3. The servicemember and three witnesses should be present at one time with the drafter of the will.[16]

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[14] E. Scoles & E. Halback, Jr., *supra* note 2, at 107.

[15] In all states except Alabama, New Jersey, and Rhode Island, a service member who is 18 years of age may execute a valid will. To bequeath land in Alabama, the service member must be 19 years of age (Ala. Code tit. 43, sec. 43-1-2).To execute a will in New Jersey (N.J. Stat. Ann. sec. 3 A:3-1 (West)), and in Rhode Island (R.I. Gen. Laws sec. 33-5-2), the service member must be 21 years of age.

An individual under 18 may execute a will in Indiana (Ind. Code sec. 29-1-5-1) or in Texas (Tex. Prob. Code Ann. sec. 57 (Vernon)) if he or she is a member of the armed forces. A service member who is married may execute a valid will, even if under the age of 18, in Idaho (Idaho Code sec. 15-2-501), Iowa (Iowa Code sec. 633.264), Maine (Me. Rev. Stat. tit. 18, sec. 1), New Hampshire (N.H. Rev. Stat. Ann. sec. 551:1), Oregon (Or. Rev. Stat. sec. 112.225), or Texas (Tex. Prob. Code Ann. sec. 57 (Vernon)). A service member 14 years of age may execute a valid will in Georgia (Ga. Code sec. 113-203) and if 16 years of age he or she can do so in Louisiana (La. Civ. Code Ann. art. 1476 (West)).

[16] Comment, *Technical Aspects of a Will: A Guide to Valid Execution and Revocation in Illinois and the Sunbelt States*, 5 John Marshall J. Prac. & Proc. 126, 133 (1971).

4. The legal assistance officer should impress upon all present the importance of the proceeding and the need to pay attention.[17]

5. The servicemember should reread the will prepared by the legal assistance officer and should verbally declare to all present that this is his will.[18]

6. The servicemember should sign the will in the prsence of all witnesses so they can clearly see the signing.[19]

7. Each will should contain an attestation clause.[20] The attestation clause should be read aloud and signed by all witnesses in the presence of each other.[21] All signatures should contain the full names of the signators. All witnesses should include their home addresses. If witnesses are military personnel they should use their homes of record as their addresses.[22]

8. Each will should contain a self-proving clause and be duly notarized at the time of signing.[23] Appendix III contains the standard self-proving clause prepared by the drafters of the Uniform Probate Code. Appendices IV-1 through IV-23 contain the self-proving clause for each state which provides for such a clause by statute.

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[17] *Id.*
[18] Id., at 134.
[19] *Id.*

[20] A sample clause is set forth in Appendix II to this article. An attestation clause is not required by any state, but it should be included because it is good evidence that the will was properly executed, and it is another means of impressing upon all concerned the importance of executing a will. 1 Wills, Est., Tr. (P-H) sec. 308.

[21] 1 Wills, Est., Tr. (P-H) sec. 308.

[22] If the need arises at probate to locate a witness, it is much easier in the case of a person who has left active service to do so by using his or her home-of-record address (which is often the address of a close relative), rather than his or her military address at the time the will was signed.

[23] Twenty-three states specifically provide by statute for self-proving clauses. (See appendix I to this article.) In the twenty-seven remaining states and the District of Columbia, there is no statutory provision for a self-proving clause. However, the inclusion of one at least adds weight to the argument that the will was properly executed, in the event the witnesses are unavailable when the will is probated.

9. All pages of the will should be numbered and initialed by the testator.

If the above procedures are followed, the will meets the standard requirements for a valid execution in all 50 states and the District of Columbia.

D. SOLDIERS' AND SEAMEN'S WILLS

Historically the wills of soldiers and seamen have been exempt from compliance with the formal requirements for will execution.[24] Because of the dangers faced by soldiers and seamen, their potential for suffering fatal disease and sudden death, and the difficulty they have in finding the time to have a will drafted, it was considered appropriate to exempt their wills[25] from formal requirements. Both the Statute of Frauds[26] and the Statute of Wills[27] excepted the wills of soldiers and seamen from their provisions. Appendix V[28] is a chart setting out which states have an exception for a soldier's and seaman's will, and what limitations, if any, they place on it. The major relevance of such a will to this article is the part it would play if a legal assistance client did not meet the statutory age for executing a will, or if a will did not meet the formal execution requirements. An example would be the state of Michigan which requires the testator to be 18 years of age.[29] In such a case a soldier under 18, who was domiciled in Michigan, could execute a will valid under the Michigan provision for exemption of soldiers' and seamen's wills.[30] However, only the servicemember's wages and personal estate would pass under this will.

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[24] 79 Am. Jur. 2d *Wills* sec. 733 (1975).
[25] *Id.*

[26] 29 Car. 2, c. 3, sec. XXIII (1677). "Provided always, that notwithstanding this Act, any Soldier being in actual Military Service, or any Mariner or Seaman being at sea, may dispose of his Moveables, Wages, and Personal Estate, as he or they might have done before the making of this Act." *Id.*

[27] 7 Will. 4 & 1 Vict., c. 26, sec. XV (1837). "Provided always and be it further enacted, That any Soldier being in actual Military Service or any Mariner or Seaman being at Sea, may dispose of his Personal Estate as he might have done before the making of this Act." *Id.*

[28] Note 12, *supra*.
[29] Mich. Comp. Laws sec. 702.1.
[30] Mich. Comp. Laws sec. 702.6.

The above discussion assumes that the primary requirement that the testator be in "actual service" has been met.[31] Some states have interpreted this requirement narrowly, requiring the performance of duty in an enemy country during time of war,[32] and other states more broadly, not requiring a formal state of war.[33] Where designated by statute, this requirement is included in the chart as Appendix V.

A soldier's and seaman's will, under most state laws, may be oral or handwritten and need not conform with the rules of execution. It is important to remember that its usefulness is often limited because of the type of property and value of property that the statutes permit to be disposed of under the terms of such a will.[34]

III. PROBATE DESCRIBED

The word *probate* is defined as follows: "The act or process of proving a will. . . . The proof before an ordinary, surrogate, register, or other duly authorized person that a document produced before him for official recognition and registration, and alleged to be the last will and testament of a certain deceased person, is such in reality."[35] To a layman the term normally refers to the law which decides the disposition of his property at his death.[36] As a general rule probate courts in the United States have jurisdiction not only over the proving of a will but also over the administration of the decedent's estate.[37] This administration includes the collection of assets, the settlement of creditors' claims, the closing of the estate, and the distribution of the estate's assets.[38]

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[31] 79 Am. Jur. 2d *Wills* sec. 735 (1975).
[32] *Id.*
[33] *Id.*
[34] *See* appendix V, *infra*. Most states limit the use of soldiers' and seamen's wills to personal property of a value of $1,000 or less.
[35] Black's Law Dictionary 1365–66 (Rev. 4th ed. 1968).
[36] Averill, *Wyoming's Law of Decedents' Estates, Guardianship, and Trusts: A Comparison with the Uniform Probate Code-Part I*, 7 Land & Water L. Rev. 169 (1972).
[37] L. Averill, *supra* note 7, at 1.
[38] *Id.*

> [S]ome probate courts also have jurisdiction over the administration of persons under a disability and their property such as minors and other

In the areas of contracts, property, and torts, most states adopted the English common law[39] and have passed little legislation in these areas.[40] Because of this, one finds much uniformity from state to state in these areas. Oftentimes out-of-state cases are cited as authority in local litigation.[41] Unfortunately, in the wills, probate, and estate administration area one does not find the same uniformity. For some reason the English common law was not adopted,[42] and in its place we find statutes passed by each state. These statutes vary greatly and create uncertainty and costly administration for those estates which contain property located in more than one state. The effect on the average citizen of this variation in state probate laws was summarized in this manner by another author:

> In recent years, the word "probate" unfortunately symbolizes in the minds of some people the evils of graft, waste and delay. The resultant cry has been "avoid probate."[43]

The same concerns and the same problems are voiced in the military community. They are symbolized by the client in a legal assistance office asking: Must my estate be probated? In what states must my estate be probated? Can I avoid probate?

> incapacitated persons. Adding to this confusion, in some jurisdictions probate courts are called "orphans' courts," "surrogates' courts," "courts of ordinary," or by the name of the court in the jurisdiction which has general or some other subject matter jurisdiction.

Id. at 2.

[39] Fratcher, *Estate Planning and Administration Under the Uniform Probate Code*, 110 TR. & Est. 5 1971).

[40] *Id.*

[41] *Id.*

[42] *Id.* "In them English law was not adopted in this country, either because it was unsuitable (e.g., primogeniture) or because the English institutions that were essential to it (e.g., the ecclesiastical courts and the Royal Prerogative) did not exist here." *Id.*

[43] L. Averill, *supra* note 7, at 3. *See also* ABA Comittee on Trends, Probate and Trust Law, *Significant Current Trends in Probate and Trust Law-1977*, 12 Real Prop., Prob., & Tr. J. 528 (1977). "[I]t is clear that the public wants less expensive wills and probate and simplified processes by which the assets accumulated by one generation are passed to the next. This is important both to the private and public sector." *Id.*

A. PROBATE PROBLEM

For an individual who spends his life in one state, owns property only in that state, and expects to die in that state, probate is no real problem, for all practical purposes.[44] So long as his will conforms to the statutory requirements for execution in his domicilary state, he can expect his property to be disposed of at his death according to the provisions of his will. He can designate in his will who he wants to administer his estate and expect this person to perform all duties required. He may be concerned with the cost of probate, but he can at least forecast this cost based on the law and practice in his state. Because he can pick an administrator he knows and one who is familiar with the state's probate proceedings, he need not worry about such things as small estate procedures or debt collection.

However, members of the armed forces do not spend their entire lives in one state, own property in only one state, or reasonably expect to die in the state where they executed their will and where they own all their property. In fact, most servicemembers can expect to be domiciled in one state, own real property in another state, have at least one bank account in a third state, execute their will in a fourth state, and die in yet another state. The facts themselves create the obvious question: Where does probate for such a serivcemember take place? The answer to this question, under the present state of the law, is based on a number of variables discussed below.

B. WHERE TO PROBATE?

1. Common Law Rules

For the purpose of this section it is assumed that a will was properly executed in the state where it was signed and witnessed. The

[44]For the purpose of this article, discussion of probate is limited to the passing of title and payment of debts. The power of a state to tax the estate of a testator will not be discussed. For a general review of this area, *see* Note, *Problematic Definitions of Property in Multistate Death Taxation*, 90 How. L. Rev. 1656 (1977).

common law rule governing real property, and the one adopted in most states, requires that a will be probated in the state or country where the real property is located, to pass legal title to that real property.[45] This rule implements a fundamental and long-standing principle of the conflict of laws, *lex laci rei sitae*, which is translated as, a state possesses exclusive jurisdiction over property situated within its borders.[46] For title to personal property to pass, the common law rule requires only that the will be probated in the domiciliary state of the testator.[47] Assuming the servicemember owns no real estate outside his state of domicile, owes no debts in a nondomiciliary state, and no one outside his domiciliary state owes him, his will need only be probated in his state of domicile. The question becomes more difficult when the servicemember owns real property outside the state of his domicile.

2. Ancillary Administration

The decedent's will must initially be probated in his state of domicile to pass title to his real property located within the domiciliary state, and to his personal property. As a general rule, the will must also be probated in the state in which the real property is located. This procedure is termed ancillary administration and amounts to a completely separate administration.[48] It is costly and time-consuming. Additional ancillary administrations are required for additional real property not located in the servicemember's state of domicile. The number of probate proceedings depends on the location of the servicemember's real property. It requires the executor appointed in the will to go to each state where real property is located and to initiate a separate probate proceeding. Alternatively, the executor can hire someone in that state to do it for him, if distance and time requirements make it necessary.

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[45] 95 C.J.S. *Wills* sec. 342 (1957); *see also* Restatement (Second) of Conflict of Laws sec. 239 (1971), and Averill, *Introduction to the Administration of Decedent's Estates Under the Uniform Probate Code*, 20 S.D. L. Rev. 297 (1975).

[46] Comment, *The Binding Effect of a Sister State's Construction of a Will*, 23 Baylor L. Rev. 575, 577 (1971). *See also* Black's Law Dictionary 1036 (Rev. 4th ed. 1968).

[47] 95 C.J.S. *Wills* sec. 342 (1957). *See also* Restatement (Second) of Conflict of Laws sec. 263 (1971), and Lerner, *The Need for Reform in Multistate Estate Administration*, 55 Tex. L. Rev. 303 (1977).

[48] Averill, *Introduction to the Administration of Decedent's Estates Under the Uniform Probate Code*, 20 S.D. L. Rev. 265, 295 (1975) [hereinafter cited as *Ad-*

Some states prohibit out-of-state executors from administering probate within their boundaries,[49] or impose other requirements on the foreign executor. In those instances a domiciliary of the state in which the property is located would have to be appointed to administer probate in the state. Once again, this is a time-consuming and costly process.

When an estate involves real estate an attorney must review the law of the state in which the property is located before he can tell a client where his will must be probated. Appendix VI is a chart which sets out which states require ancillary administration for real property and whether a nondomiciliary qualifies to serve as an executor of the estate in the ancillary administration. A quick review of this chart points out the differences in state law.[50] It is obvious from the chart that every estate containing real property will have to be probated in the state where the real property is located.[51] It should not be forgotten that the chart is based on the statutes of each state and actual practice may vary based on case law or local implementation.

3. Collecting Debts and Assets

The issue of probate also arises when the executor of an estate attempts to collect debts or personal property of a decedent which are located outside the decedent's domicile. A common example of this problem is when the testator has a bank account in a bank lo-

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ministration Under U.P.C.]. *See also* L. Averill, *supra* note 7, at 279, and Vestal, *Multi-State Estates Under the Uniform Probate Code*, 9 Creighton L. Rev. 529, 529 (1976).

[49] Lerner, *The Need for Reform in Multistate Estate Adminstration*, 55 Tex. L. Rev. 303, 304, 305 (1976).

[50] Twenty-three states permit non-domiciliaries to be executors in an ancillary administration without imposing special conditions. Three states, Missouri, Nevada, and Wyoming, specifically exclude non-domiciliaries from being executors.

[51] The District of Columbia and all states except Mississippi, Nevada, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming, require by statute an ancillary administration for all real property located within their state boundaries which is owned by a non-resident decedent.

cated outside his domiciliary state.[52] The executor or personal representative of the estate must go to the bank, as part of his job in collecting all the decedent's assets, and attempt to obtain the funds remaining in the account. He is initially faced with the question of whether or not the bank will voluntarily turn over the funds or whether he will have to open or have opened in the state an ancillary administration. The bank is concerned about the possibility of its liability to other potential representatives of the estate or creditors of the decedent if it prematurely turns the funds over to the out-of-state personal representative of the estate.

In some states this creates no problem because the state laws permit the foreign representative to receive voluntary payment and to release the bank from liability so long as local creditors of the decedent, if any, are not prejudiced.[53] In other states a foreign representative must first file an authenticated copy of his letter testamentary (or other similar proof that he has been appointed administrator or executor of the estate in the decedent's state of domicile) at the office of the local registrar of deeds before he can collect funds due the testator.[54] Some states condition such collection on the receipt of no prior written demand from a creditor, and on a delay of from 60 days to six months.[55]

If there is no separate provision for collection by the foreign representative, then his only recourse, if the bank refuses his request to turn the assets over to him, is to open an ancillary administration in the state in which the bank is located. The power of a foreign representative to collect debts and personal property of a nonresident decedent in the District of Columbia and the fifty states is outlined in Appendix VII. A summary of conditions imposed for such collection is included.

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[52] Vestal, *Multiple-State Estates Under the Uniform Probate Code*, 27 Wash. & Lee L. Rev. 70 (1970).

[53] Swann v. Bill, 95 N.H. 158, 161, 59 A.2d 346, 348 (1948). "By comity, in the absence of the appointment of an ancillary administrator in this state, a foreign administrator may collect the assets of the estate located here when there is no prejudice to local interest . . . . If there is need, any creditors may petition for ancillary administration in this state." *Id.*; Ga. Code sec. 113-2406; Md. Est. & Trusts Code Ann. sec. 5-502.

[54] Ala. Code tit. 43, sec. 43-2-211; Iowa Code sec. 633.144; Miss. Code Ann. sec. 622.

[55] Fla. Stat. sec. 734.101; Ind. Code Ann. 29-2-1-2 and 29-2-1-4 (Burns).

Besides collecting all the assets of the testator, the executor also is responsible for collecting all debts owed the testator. If a debtor refuses to pay, the executor's only alternative in most cases is to sue for collection. There is no problem when the debtor is located in the same state as that in which the testator was domiciled. Having been appointed by the court in probate to be the executor of the estate, the executor has the power to sue an in-state debtor for collection of debts owed the testator.

The difficulty arises when the debtor is located in a state other than the state where the will has been probated and where the executor has been appointed. The issue is whether the court where the debtor is located will take jurisdiction of a case when the party seeking relief is an executor of an estate appointed in another state. Under English common law an executor or administrator acting in his official capacity could not maintain a suit outside the state in which he was appointed.[56] Some states have followed this rule or expressly adopted it by statute,[57] and refuse jurisdiction over suits brought by a foreign executor, unless there is a proceeding for probate (ancillary administration) in their courts.[58] The practical basis for this rule was aptly summarized as follows:

> [T]he real basis for the general rule seems to be the policy of the forum to require administration under its direction so that local creditors may be protected from the inconvenience and the uncertainty of enforcing their claims in a foreign jurisdiction. This policy eliminates the expense that local creditors would incur going to another jurisdiction to present and prove their claims. It also keeps local

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[56] Noel v. St. Johnsbury Trucking Co., 147 F. Supp. 432, 433 (D. Conn. 1956).
[57] Or. Rev. Stat. sec. 43.180.

[58] *Id. See generally*, Note, *The Extraterritorial Authority of Executors and Administrators to Sue and Collect Assets*, 52 Iowa L. Rev. 290 (1966–67) [hereinafter cited as *Extraterritorial Authority*].

> [T]he rule traditionally has been explained in terms of a territorial concept of the law. The authority of a personal representative is said to be derived from the court which appointed him. Since the state courts have no authority to operate outside their boundaries, a personal representative's official capacity is confined to the territorial limits of the jurisdiction of his appointment and he receives no legal recognition outside that jurisdiction.

Id., at 290–91.

> creditors from having to litigate in jurisdictions with different rules for determining the right of creditors.[59]

As is the case with most rules, there are exceptions to the common law rule. In at least one state, California, the courts have permitted a waiver of the personal reprentative's incapacity to sue for debt collection where the defendant debtor fails to make a timely objection to the foreign representative's ability to sue.[60] Other states have created exceptions in permitting the personal representative to sue as an individual rather than in his or her capacity as representative of the state,[61] or in allowing the personal representative to sue on a negotiable instrument which is part of the assets of the estate in his or her possession.[62] Still other states permit a suit by the personal representative under certain death acts for the wrongful death of the decedent,[63] and permit the foreign representative to assign to a third party a claim upon which he or she could not sue.[64]

Besides making exceptions to the rule, some states have passed legislation authorizing foreign executors to sue for debt collection without opening ancillary administrations within the state. These statutes differ substantially and the law of each state must be examined separately when reviewing the effect of the statute. For instance, Wisconsin permits the foreign representative of an estate to have the same power to sue as a locally appointed executor.[65] On the other hand, before suing to collect debts in some states, the foreign representative must fulfill certain conditions. They can include such steps as filing an authenticated copy of letters testamentary or letters of administration in the same court in the state where the action to collect debts is being brought.[66] Other condi-

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[59] *Id.*, at 292.
[60] Confield v. Scripps, 15 Cal. App. 642, 647, 59 P.2d 1040, 1042 (2d Dist. 1936)
[61] *See, e.g.*, Reed v. Hostiller, 95 Ore. 656, 664, 188 Pac. 170, 173 (1920).
[62] *See, e.g.*, Michigan Trust Co. v. Chaffee, 73 N.D. 86, 91-94, 11 N.W. 2d 108, 110-12 (1943).
[63] *See e.g.*, La May v. Maddox, 68 F.Supp. 25, 27 (W.D. Va. 1946).

[64] *See e.g.*, Vogel v. New York Life Ins. Co., 55 F.2d 205 (5th Cir. 1932). For a discussion in greater depth of exceptions to the common law rule, *see Extraterritorial Authority, supra* note 58.

[65] Wis. Stat. sec. 287.16.
[66] Miss. Code Ann. sec. 622.

tions may include posting a bond before bringing suit,[67] or permitting suits by a foreign representative only in the absence of local probate,[68] or giving notice to all domestic creditors.[69] In Appendix VIII there is an outline showing which states permit foreign representatives to sue for debt collection and the conditions, if any, imposed on such representatives.

4. Probate

An in-depth discussion of the different types of probate is beyond the scope of this article. However, the reader should keep in mind that when the term probate or the term ancillary administrition is used, each term can refer to, at a minimum, two basic types of procedures: formal probate, and small estate procedures. Formal probate is closely regulated by the court and involves a number of specific and regimented steps. Small estate procedures are much less formal and less complicated, but there is a limit on the size of an estate eligible for such probate. This size limitation is based on type of property and value. Appendix IX is a chart which indicates which states authorize use of small estate procedures and the limits, if any, placed upon their use.

C. PROBATE AVOIDANCE

It is possible to avoid all, if not most, of the problems described up to this point by taking the necessary measures to avoid probate entirely or to limit the potential problems. The problem of ancillary administration can be eliminated if the servicemember owns real property only in his or her state of domicile, and has bank accounts only in his or her state of domicile. Further, he should be careful to limit debtors to those who are domiciled in the servicemember's state of domicile. This approach has been summarized in this way:

> [T]here is no reason why a testator-to-be who comes to a lawyer cannot be advised to move all of his tangible and intangible assets (except real estate, and maybe he should

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[67] Ky. Rev. Stat. sec. 395.170.
[68] Tex. Prob. Code Ann. sec. 107A (Vernon).
[69] R.I. Gen. Laws sec. 33-18-26.

> sell or give that way) to the state where he is making his will and expects to die. Then, even if he dies a resident of some other state, at least there is not as much of a problem as exists if assets are scattered all over the earth.[70]

This is a simple solution to a complex problem but not a realistic one. It seems absurd to suggest that a servicemember not purchase real estate outside his or her domicilary state because of the potential problem of ancillary administration.

Probate can be avoided in a more conventional manner by planning an estate which passes no interest in property through a will at date of death. This can be accomplished by several means, such as intervivos trusts, life-time gifts, jointly-owned property with right to survivorship, and life insurance.[71]

IV. UNIFORM PROBATE CODE

It is obvious from what has been written up to this point that a multi-state estate, which most servicemembers will have, creates complex problems for the legal assistance officer, the servicemember, and the individual appointed executor of the servicemember's estate. In many cases probate avoidance is not reasonable, based on the individual servicemember's particular fact situation. In other cases the facts are such that probate can be partly, but not completely, avoided. At this time there is available to all states the text of a uniform code which has been prepared to help simplify probate in general, and multi-state probate in particular.

The Uniform Probate Code [hereinafter referred to as the UPC] was prepared in a seven-year project by the National Conference of Commissioners on Uniform State Laws with the assistance of the Real Property, Probate, and Trust Law Section of the American Bar Association. It was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August 1969.

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[70] Shriver, *The Multi-State Estate*, 3 Real Prop., Prob. & Tr. 189, 194 (1968).
[71] For a more complete discussion of probate avoidance, *see* R. Hendrickson, Interstate and International Estate Planning (1968).

A number of technical amendments have been made to the code by the Joint Editorial Board for the Uniform Probate Code. These amendments were approved in 1975 by the National Conference of Commissioners, and in 1976 by the American Bar Association. They are referred to as the Technical Amendments.[72]

The code has been submitted to the legislatures of the fifty states, and as of now it has been adopted in some form by eleven states.[73] The general purpose of the UPC, in the context of this article, is to simplify the law of probate,[74] to conform with and make effective the intent of the decedent in the distribution of his property,[75] to speed up the probate process,[76] and to make uniform among the states the law of probate.[77]

A. THE UNIFORM PROBATE CODE AND WILLS

Article II of the Uniform Probate Code[78] sets out standard rules for execution of wills. The intent of this part of the code is to standardize the execution of a will in all states. In so doing, this provision would eliminate the problem of lack of uniformity among the states which was described in section II of this article, above.

Under the code, an individual must be 18 years old or older and be of sound mind[79] to have the testamentary capacity to execute a will. The code does not provide for a soldier's or seaman's will. Under its provisions a soldier under 18 years of age would not possess the necessary testamentary capacity to execute a will.

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[72] L. Averill, *supra* note 7, at 6.

[73] Alaska Stat. secs. 13.06.005 to 13.36.100; Ariz. Rev. Stat. secs. 14-1101 to 14-7307; Colo. Rev. Stat. secs. 15-10-101 to 15-17-101; Haw. Rev. Stat. secs. 560:1-101 to 560:8-102; Idaho Code secs. 15-1-101 to 15-7-307; Minn. Stat. secs. 524.1-101 to 524.5-502; Mont. Rev. Codes Ann. secs. 91A-1-101 to 91A-6-104; Neb. Rev. Stat. secs. 30-2201 to 30-2902; N.M. Stat. Ann. secs. 32 A-1-101 to 32 A-7-401; N.D. Cent. Code secs. 30.1-01-01 to 30.1-35-01 (1976); and Utah Code Ann. secs. 75-1-101 to 75-8-101.

[74] U.P.C. sec. 1-102(b)(1) (1975 version).
[75] *Id.*, sec. 1-102(b)(2).
[76] *Id.*, sec. 1-102(b)(3).
[77] *Id.*, sec. 1-102(b)(5).
[78] U.P.C. art. II (1975 version).
[79] U.P.C. sec. 2-501 (1975 version).

In addition, the code requires that all wills be in writing[80] and signed by the testator or signed in the testator's name by someone else in the testator's presence and by his or her direction.[81] Wills must be witnessed and signed by two witnesses,[82] who at the time must be competent to be witnesses.[83] Witnesses may have an interest in the will.[84] The witnesses are not required to be present when the testator signs the will. However, if they are not present, they must be present later when the testator acknowledges the signature or the will.[85]

The reader should note that the above requirements do not include any of the following steps often required by present state law to execute a will: a signing at the end of the will; witnesses signing in each other's presence; witnesses signing in the presence of the testator; or a statement by the testator that he published the document as his will.[86] To some extent these omissions reduce the formality required to execute a valid will.

Notwithstanding the above requirements, the code does permit holographic wills, if they are signed by the testator and if the material provisions are in the testator's handwriting.[87] This provisons would permit a soldier 18 years or older to perpare a will in his or her own handwriting and to sign it with resulting validity. However, this does not equate to a soldier's or seaman's will, which may also be verbal.

The code does not require that, in order to be valid, a will contain

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[80] *Id.*, sec. 2-502.
[81] *Id.*
[82] *Id.*

[83] *Id.*, sec. 2-505. The phrase "competent to be a witness" is not defined in the code. It is assumed that this means any person competent to testify in court; if so, it includes minors. L. Averill, *supra* note 7, at 75.

[84] U.P.C. sec. 2-505 (1975 version). This is a departure from the common law, which disqualified a person as a witness if he or she had an interest in the will. *Id.*, comment.

[85] U.P.C. sec. 2-502 (1975 version).
[86] L. Averill, *supra* note 7, at 74.
[87] U.P.C. sec. 2-503 (1975 version).

a self-proving clause. However, it does provide that any attested will may be made self-proven by the testators' acknowledgement and affidavits of the witnesses, made before an officer authorized to administer oaths under the laws of the state.[88] The code provides further that a will may be executed, attested, and made self-proven simultaneously.[89] Copies of the self-proving clauses suggested in the code are found in Appendices III and X. A self-proven will may be admitted to probate without additional witnesses or affidavits.[90] However, it is still subject to attack on such grounds as revocation, undue influence, lack of testamentary capacity, fraud, and forgery.[91]

The issue of whether a will is executed in a manner valid in several different states is simplified by the code. So long as the will is in writing, it is valid, if executed according to the provisions discussed above. Alternatively, it is valid:

> if the execution complies with the law at the time of execution of the place where the will is executed, or the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.[92]

Such a will may be probated in a state which has adopted the U.P.C.

This provision permits a lawyer to have a will executed according to the requirements of the code or the state in which it is being executed, with expectation that it will be valid and acceptable for probate in any state which has adopted the U.P.C. The lawyer can then assure the client that the will being executed will be accepted in probate, and that the testator's desires as to disposition will be carried out. This is a great advance over the present answer to the question raised in section II.B. above: Is the will I am now executing going to be valid in my domiciliary state, in all states, or only in this state?

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[88] *Id.*, sec. 2-504(b).
[89] *Id.*, sec. 2-504(a).
[90] *Id.*, comment.
[91] L. Averill, *supra* note 7, at 80.
[92] U.P.C. sec. 2-506 (1975 version).

B. THE UNIFORM PROBATE CODE AND THE MULTI-STATE ESTATE

The primary goal of the U.P.C. is to permit a unified administration of a decedent's estate which is located in more than one state.[93] In so doing, the code initially accepts the long-standing assumption that each state controls the law which determines title to its lands.[94] To accomplish its goal the code places heavy emphasis on probate first taking place in the state of decedent's domicile. The code then gives the personal representative of the decedent particular rights and protections in all other states where ancillary administration is required, to permit administration of the entire estate by one person.

Under the U.P.C., administration of an estate should initially begin in the decedent's state of domicile.[95] If there is a dispute between states as to which is the correct domicile of the decedent, the code gives priority to the state in which the probate proceeding was first initiated.[96] If no property, creditors, or debtors are located outside the state of domicile, this is the only probate administration required. This is similar to that found in states which have not adopted the U.P.C. The form of probate under the code may be informal, formal, or supervised.

The code substantially changes the approach to ancillary administration in this area, adding the uniformity which it declares to be part of its purpose. If there is real property located outside the state of domicile, the executor of the estate must open an ancillary administration in that state.[97] The code recognizes the right of a state to control title to real property located within its boundaries. The change at this point between the U.P.C. an other state statutes governing probate is the recognition given to the individual appointed personal representtive in the domiciliary state:

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[93] Wellman, *How the Uniform Probate Code Deals with Estates that Cross State Lines*, 5 Real Prop., Prob. & Tr. J. 159, 159 (1970); *Administration Under U.P.C.*, *supra* note 48, at 295.

[94] Wellman, *supra* note 93, at 159; U.P.C. sec. 1-301 (1975 version).
[95] U.P.C. sec. 3-201(a) (1975 version).
[96] U.P.C. sec. 3-202 (1975 version).
[97] U.P.C. secs. 1-301, 1-302, and 3-201(a)(2) (1975 version).

> A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will noninates different persons to be personal representatives in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.[98]

Once the personal representative is appointed representative in the nondomiciliary state, most of the ancillary adminstration is complete, except for actual transfer of title to the property. This is so because the remaining activity will take place in the testator's domicile,[99] and actions taken in the testator's domicile must be given recognition in the state where ancillary administration is taking place. After proper notice and an opportunity for contest by all interested parties, domiciliary adjudications concerned with testacy, will validity or will construction must be considered res judicata in a code nondomiciliary jurisdication.[100]

Under the code, one does not experience confusion concerning whether and to what extent the personal representative has power to act in ancillary administration. Once the will is probated in the decedent's state of domicile, the personal representative appointed there has the power to administer all other ancillary administrations. This unifies the administration under one person and may thereby reduce administrative costs.

The code simplifies the procedure for debt and asset collection where the debtor and assets are located outside the decedent's state of domicile. The personal representative appointed in the decedent's state of domicile may, within 60 days of the decedent's death, solicit or receive payments of debts and deliveries of assets from debtors located outside the state of domicile, if they are located in states which have adopted the U.P.C.[101]

When asking for payment, the personal representative must present to the debtor, or to the possessor of decedent's assets, an

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[98] U.P.C. sec. 3-203(g) (1975 version).
[99] *Administration Under U.P.C.*, *supra* note 48, at 296.
[100] U.P.C. sec. 3-408 (1975 version).
[101] U.P.C. sec. 4-201 (1975 version).

affidavit. This document must state the date of the decedent's death; that no local administration, or application or petition therefor, is pending; and that the domiciliary personal representative is entitled to payment or delivery.[102]

Any debtor or possessor of assets who, acting in good faith, transfers assets or pays debts based on this affidavit, is released from liability to the same extent as if payment or delivery had been made to a local personal representative.[103] Under this provision of the code, there is no difficulty in determining the power of the foreign personal representative. This procedure speeds up and simplifies the administration of the estate.

Creditors located outside the state of domicile may prevent this form of payment or transfer of assets by notifying the debtors or possessors of assets that they should not pay the debt or transfer the assets.[104] This protects local creditors from having to pursue their claims in another state. If the local creditor invokes this right, the foreign representative must then file an authenticated copy of his or her document of appointment from the domiciliary state, and a copy of his or her official bond if he or she has been given one.[105] Filing must take place in the court where the property (debt or asset) belonging to the decedent is located.

Once filing is completed, the foreign representative may exercise, as to assets located in the state, all the powers of a local personal representative. He may maintain actions and proceedings in the nondomiciliary state, subject only to any conditions imposed upon nonresident parties generally.[106] At this point there is no longer any issue concerning the power of the foreign representative to bring suit to recover debts or assets owed the estate. Once again, this simplifies the procedure found in noncode states.

Rather than follow the two procedures discussed above, the per-

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[102] *Id.* This procedure does not apply to the transfer of securities, which is covered by section 3 of the Uniform Act for Simplification of Fiduciary Security Transfers. *Id.*, at comment.

[103] U.P.C. sec. 4-202 (1975 version).
[104] *Id.*, sec. 4-203.
[105] *Id.*, sec. 4-204.
[106] *Id.*, sec. 4-205.

sonal representative may think it necessary to initiate an ancillary administration in the nondomiciliary state, instead of avoiding it.[107] If someone else initiates this before he or she does, the representative immediately loses his power to receive debt payments and assets as a foreign representative.[108] However, his or her priority position is still protected. When an ancillary administration is initiated by someone else, the foreign representative still has the same priority for appointment that he would have had if he had initiated the ancillary administration himself.[109] If it appears likely that someone else is going to initiate an administration if the personal representative does not do it himself, the representative might as well do it simply to save time for collection of the debts and assets owed the estate. In any event, the procedure for a foreign personal representative under the U.P.C. unifies the administration of the estate and makes predictable the answer to the question of whether a particular will must be probated.

V. CONCLUSION

Under the present state of the law, legal assistance officers who are preparing wills must insure they comply with the will execution requirements of their client's domiciliary state. Failure to do so potentially defeats the purpose of the will because a will not accepted in probate is the same as no will at all. This problem can be prevented by reviewing the state requirements for will execution for each client's domicile, or by following the will execution steps set forth in this article.

Ancillary administration is not easily avoidable. However, at a minimum, clients should be made aware of the problem and the costs in terms of time delay and dollars and cents. In many instances a will is prepared and an executor named in the will with no recognition of the potential problems facing the executor, should the estate contain real property, bank accounts, or accounts receivable located outside the testator's domicile. For an estate consisting of anything more than minimal personal property, thought should be given to naming an executor who is capable of handling the complications and details of probate.

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[107] Vestal, *Multi-State Estates Under the Uniform Probate Code*, 9 Creighton L. Rev. 529, 531 (1976).
[108] U.P.C. sec. 4-206 (1975 version).
[109] U.P.C. sec. 3-203(g) (1975 version).

At the present time it is not practical or realistic to propose legislation to protect service personnel from the probate problems described in this article. However, most of these, such as will execution, power of the executor to collect debts and to sue, and place of probate, are simplified by the U.P.C. As an alternative to federal legislation similar to the existing Soldiers' and Sailors' Civil Relief Act, all states which have not adopted the U.P.C. should reconsider it, at least as it might apply to the servicemember. Although it is not in vogue to mention the fact, servicemembers, by the very essence of their military service, have foregone the opportunity to manage their personal affairs to answer their country's call.[110] For this reason they deserve at least minimal protection from the complex probate problems created by the variations presently found in state laws.

[110] Le Maistre v. Leffers, 333 U.S. 1, 6 (1947).

APPENDIX I
WILL EXECUTION

Note: In referring to this chart each lawyer should recognize that state statutes are frequently amended and that state court decisions are used to interpret each statute. The author has relied on the statutes themselves in drafting this chart.

	Testamentary Capacity Required	Age of Testator	Signature	Number of Witnesses	Provision for Self-Proving Clause
ALABAMA	Yes (sound mind)	19 (land) 18 (personal property	Yes	2	No
Ala. Code tit. 43	§43-1-1	43-1-2	43-1-30	43-1-30	—
ALASKA (UPC)*	Yes (sound mind)	18	Yes	2	Yes
Alaska Stat.	§13.11.150	13.11.150	13.11.155	13.11.155	13.11.165
ARIZONA (UPC)	Yes (sound mind)	18	Yes	2	Yes
Ariz. Rev. Stat.	§14-2501	14-2501	14-2502	14-2502	14-2504
ARKANSAS	Yes (sound mind)	18	Yes	2	No
Ark. Stat. Ann.	§60-401	60-401	60-403	60-403	—
CALIFORNIA	Yes (sound mind)	18	Yes	2	No
Cal. Prob. Code (West)	§20	20	50	50	—
COLORADO (UPC)	Yes (sound mind)	18	Yes	2	Yes
Colo. Rev. Stat.	§15-11-501	15-11-501	15-11-502	15-11-502	15-11-504
CONNECTICUT	Yes (sound mind)	18	Yes	2	No
Conn. Gen. Stat.	§45-160	45-160	45-161	45-161	—
DELAWARE	Yes (sound & disposing mind & memory)	18	Yes	2	Yes
Del. Code tit. 12,	§201	201	202	202	1305
DISTRICT OF COLUMBIA	Yes (sound & disposing mind)	18	Yes	2	No
D.C. Code	18-102	18-102	18-103	18-103	—
FLORIDA	Yes (sound mind)	18	Yes	2	Yes
Fla. Stat.	§732.501	732.501	732.502	732.502	732.503
GEORGIA	Yes (unless laboring under some legal disability)	14	Yes	2	No
Ga. Code	§113-201	113-203	113-301	113-301	—
HAWAII (UPC)	Yes (sound mind)	18	Yes	2	Yes
Haw. Rev. Stat.	§560:2-501	560:2-501	560:2-502	560:2-502	560:2-504
IDAHO (UPC)	Yes (sound mind)	18 or emancipated minor	Yes	2	Yes
Idaho Code	§15-2-501	15-2-501	15-2-502	15-2-502	15-2-504

	Testamentary Capacity Required	Age of Testator	Signature	Number of Witnesses	Provision for Self-Proving Clause
ILLINOIS	Yes (sound mind and memory)	18	Yes	2	No
Ill. Ann. Stat. (Smith-Hurd)	c. 3 §4-1	4-1	4-3	4-3	—
INDIANA	Yes (sound mind	18 (or younger if a member of Armed Forces)	Yes	2	Yes
Ind. Code (Burns)	§29-1-5-1	29-1-5-1	29-1-5-2	29-1-5-3	29-1-5-3
IOWA	Yes (sound mind)	Full Age (18 or married)	Yes	2	Yes
Iowa Code	§633.264	633.264	633.279	633.279	633.279
KANSAS	Yes (sound mind)	Possessing rights of majority (18)	Yes	2	Yes
Kan. Stat.	§59-601	59-601	59-606	59-606	59-606
KENTUCKY	No	18	Yes	2	Yes
Ky. Rev. Stat.	—	§ 394.030	394.040	394.040	394.225
LOUISIANA (Statutory will)	Yes (law declares incapable)	16	Yes	2	No
La. Civ. Code Ann. art. (West)	1475	1476	La. Rev. Stat. Ann. §9.2442 (West)	1587	—
MAINE	Yes (sound mind)	18 (or married, widow, or widower)	Yes	3	No
Me. Rev. Stat. Tit. 18	§1	1	1	1	—
MARYLAND	Yes (legally competent)	18	Yes	2	No
Md. Est. & Trusts Code Ann.	§4-101	4-101	4-102	4-102	—
MASSACHUSETTS	Yes (sound mind)	18	Yes	2	No
Mass. Gen. Laws Ann. Ch. 191	§1	1	1	1	—
MICHIGAN	Yes (sound mind	18	Yes	2	No
Mich. Comp. Laws	§702.1	702.1	702.5	702.5	—
MINNESOTA (UPC)	Yes (sound mind)	18	Yes	2	Yes
Minn. Stat.	§524.2-501	524.2-501	524.2-502	524.2-502	524.2-504
MISSISSIPPI	Yes (sound & disposing mind)	18	Yes	2	No
Miss. Code Ann.	§91-5-1	91-5-1	91-5-1	91-5-1	—
MISSOURI	Yes (sound mind)	18	Yes	2	No
Mo. Rev. Stat.	§474.310	474.310	474.320	474.320	—

	Testamentary Capacity Required	Age of Testator	Signature	Number of Witnesses	Provision for Self-Proving Clause
MONTANA (UPC)	Yes (sound mind)	18	Yes	2	Yes
Mont. Rev. Codes Ann.	§91A-2-501	91A-2-501	91A-2-502	91A-2-502	91A-2-504
NEBRASKA (UPC)	Yes (sound mind)	18 (or is not a minor)	Yes	2	Yes
Neb. Rev. Stat.	§30-2326	30-2326	30-2327	30-2327	30-2329
NEVADA	Yes (sound mind)	18	Yes	2	No
Nev. Rev. Stat.	§133.020	133.020	133.040	133.040	—
NEW HAMPSHIRE	Yes (sane mind)	18 (or under 18 if married)	Yes	3	No
N.H. Rev. Stat. Ann.	§551:1	551:1	551:2	551:2	—
NEW JERSEY	Yes (sound mind & memory)	21	Yes	2	No
N.J. Stat. Ann. (West)	§3A:3-1	3A:3-1	3A:3-2	3A:3-2	—
NEW MEXICO (UPC)	Yes (sound mind)	Age of majority	Yes	2	Yes
N.M. Stat. Ann.	§32A-2-501	32A-2-501	32A-2-502	32A-2-502	32A-2-504
NEW YORK	Yes (sound mind & memory)	18	Yes	2	No
N.Y. Est., Powers & Trusts Law (McKinney)	§3-1.1	3-1.1	3-2.1	3-2.1	—
NORTH CAROLINA	Yes (sound mind)	18	Yes	2	Yes
N.C. Gen. Stat.	§31-1	31-1	31-3.3	31-3.3	31.11.1
NORTH DAKOTA (UPC)	Yes (sound mind)	Adult	Yes	2	Yes
N.D. Cent. Code	§14-01-03	30.1-08-01	30.1-08-02	30.1-08-02	30.1-08-04
OHIO	Yes (sound mind & memory, & not under restraint)	18	Yes	2	No
Ohio Rev. Code Ann. (Page)	§2107.02	2107.02	2107.03	2107.03	—
OKLAHOMA	Yes (sound mind)	18	Yes	2	Yes
Okla. Stat. tit. 84	§41	41	55	55	55
OREGON	Yes (sound mind)	18 (or has been lawfully married)	Yes	2	No
Or. Rev. Stat.	§112.225	112.225	112.235	112.235	—
PENNSYLVANIA	Yes (sound mind)	18	Yes	2	Yes
20 Pa. Cons. Stat.	§2501	2501	2502	2502	3132.1
RHODE ISLAND	Yes (sane mind)	21	Yes	2	No
R.I. Gen. Laws	§33-5-2	33-5-2	33-5-5	33-5-5	—

	Testamentary Capacity Required	Age of Testator	Signature	Number of Witnesses	Provision for Self-Proving Clause
SOUTH CAROLINA	Yes (sound mind)	18	Yes	3	No
S.C. Code	§21-7-10	21-7-10	19-205	19-205	—
SOUTH DAKOTA (Repealed UPC)	Yes (sound mind)	18	Yes	2	Yes
S.D. Compiled Laws Ann.	§29-2-14	29-2-14	29-2-6	29-2-6	29-2-6.1
TENNESSEE	Yes (sound mind)	18	Yes	2	No
Tenn. Code. Ann.	§32-102	32-102	32-104	32-104	—
TEXAS	Yes (sound mind)	18 (or who is or has been lawfully married, or a member of the Armed Forces of the United States)	Yes	2	Yes
Tex. Prob. Code Ann. (Vernon)	§57	57	59	59	59
UTAH (UPC)	Yes (sound mind)	18	Yes	2	Yes
Utah Code Ann.	§75-2-501	75-2-501	75-2-502	75-2-502	75-2-504
VERMONT	§Yes (sound mind)	Of age (18)	Yes	3	No
Vt. Stat. Ann. tit. 14	§1	1	5	5	—
VIRGINIA	Yes (sound mind)	18	Yes	2	Yes
Va. Code	§64.1-47	64.1-47	64.1-49	64.-149	64.1-87-1
WASHINGTON	Yes (sound mind)	18	Yes	2	No
Wash. Rev. Code	§11.12.010	11.12.010	11.12.020	11.12.020	—
WEST VIRGINIA	Yes (sound mind)	18	Yes	2	No
W.Va. Code	§41-1-2	41-1-2	41-1-3	41-1-3	—
WISCONSIN	Yes (sound mind)	18	Yes	2	No
Wis. Stat.	§853.01	853.01	853.03	853.03	—
WYOMING	Yes (sound mind)	Adult	Yes	2	No
Wyo. Stat.	§2-47	2-47 & 14-1.1	2-50	2-50	—

— Indicates no statutory provision.
*UPC designates states which have adopted the Uniform Probate Code.

APPENDIX II

ATTESTATION CLAUSE

Signed, sealed, published and declared by _____, the above-named testator, who is known to us [appears to us] to be of sound and disposing mind and memory, as and for his Last Will and Testament in our presence, and we, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses this ____ day of ___ 19_.

_____
Full name & address

_____
Full name & address

_____
Full name & address

Note: This clause is adopted from a sample clause in 4 Wills, Est. Tr. (P-H) § 21.103.

APPENDIX III

(For a Will Simultaneously Executed, Attested and Self-Proved)

I, _____, the testator, sign my name to this instrument this ___ day of _____, 19___, and, being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

We, _____, and _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

THE STATE OF _____
COUNTY OF _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of ___.

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

APPENDIX IV[1]

Alaska Self-Proving Clause

I, _____, the testator, sign my name to this instrument this _____ day of _____, 19___, and, being first sworn, declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes expressed in it, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

We, _____ and _____, the witnesses, sign our names to this instrument, and, being first sworn, declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

THE STATE OF _____
COUNTY OF _____ [or _____ Judicial District]

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this ___ day of ___.

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

[Alaksa Stat. § 13.11.165]

APPENDIX IV$_2$

Arizona Self-Proving Clause

I, _____, the testator, sign my name to this instrument this day of _____, 19___, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), and I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

We, _____, and _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no contraint or undue influence.

_____
Witness

_____
Witness

THE STATE OF _____
COUNTY OF _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____.

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

[Ariz. Rev. Stat. § 14-2504]

APPENDIX IV$_3$

Colorado Self-Proving Clause

I, _____, the testator, sign my name to this instrument this __ day of _____, 19 __, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purpose therein expressed, and that I am eighteen years of age or older, of sound mind, and under no contraint or undue influence.

_____
Testator

We, _____, and _____, the witnesses,sign our names to this instrument, being first duly sworn, and so hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that he executes it as his free and voluntary act for the purposes therein expressed, and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of his knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

THE STATE OF _____
COUNTY OF _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this ___ day _____.

_____
(Signed)

_____
(Official capacity of officer)

[Colo. Rev. Stat. § 15-11-504]

APPENDIX IV[4]

Delaware Self-Proving Clause

STATE OF _____
COUNTY OF _____

Before me, subscriber, on this day personally appeared ___, ___, and _____, known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn, _____, the testator, declared to me and to the witnesses in my presence that the instrument is his last will and that he had willingly signed or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence and hearing of the testator, that he signed the will as witness and that to the best of his knowledge the testator was eighteen years of age or over, of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn and acknowledged before me by _____ the testator, subscribed and sworn before me by _____ and _____, witnesses, this ___ day of _____ A.D., ___.

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

[Del. Code tit. 12, § 1305]

APPENDIX IV$_5$

Florida Self-Proving Clause

STATE OF _____
COUNTY OF _____

We, _____, _____, and _____, the testator and the witnesses respectively, whose names are signed to the attached or foregoing instrument, were sworn and declared to the undersigned officer that the testator in the presence of witnesses signed the instrument as his last will (codicil), that he signed (or directed another to sign for him) and that each of the witnesses, in the presence of the testator and in the presence of each other, signed the will as a witness.

_____
(Testator)

_____
(Witness)

_____
(Witness)

Subscribed and sworn to before me by _____, the testator, and by ____ and ____, the witnesses, on ____, 19__.

_____
(Notary Public)
My Commission Expires:

[Fla. Stat. § 732.503]

APPENDIX IV$_6$

Hawaii Self-Proving Clause

THE STATE OF _____
COUNTY OF _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen or more years of age, of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, _____.

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

[Haw. Rev. Stat. § 560:2-504]

APPENDIX IV$_7$

Idaho Self-Proving Clause

THE STATE OF _____
COUNTY OF _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of testator, signed the will as witness and that to the best of his knowledge the testator was at that time an adult, of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, __.

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

[Idaho Code § 15-2-504]

APPENDIX IV$_8$

Indiana Self-Proving Clause

UNDER PENALTIES FOR PERJURY, We, the undersigned _____, _____, and _____, testator and the undersigned witnesses respectively, whose names are signed to the attached or foregoing instrument declare:

(1) that the testator executed the instrument as his will;

(2) that, in the presence of both witnesses, the testator signed or acknowledged his signature already made or directed another to sign for him in his presence;

(3) that he executed the will as his free and voluntary act for the purposes expressed in it;

(4) that each of the witnesses, in the presence of the testator and of each other, signed the will as witness;

(5) that the testator was of sound mind; and

(6) that to the best of his knowledge the testator was at the time eighteen (18) or more years of age, or was a member of the armed forces or the merchant marine of the United States, or its allies.

_____
Testator

_____
Date

_____
Witness

_____
Witness

[Ind. Code § 29-1-5-3]
(Burns)

APPENDIX IV_9

Iowa Self-Proving Clause

STATE OF _____
COUNTY OF _____

We, the undersigned, ____, ____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, declare to the undersigned authority that said instrument is the testator's will and that the testator willingly signed and executed such instrument, or expressly directed another to sign the same in the presence of the witnesses, as a free and voluntary act for the purposes therein expressed; that said witnesses, and each of them, declare to the undersigned authority that such will was executed and acknowledged by the testator as the testator's will in their presence and that they, in the testator's presence, at the testator's request, and in the presence of each other, did subscribe their names thereto as attesting witnesses on the date of such will; and that the testator, at the time of the execution of such instrument, was of full age and of sound mind and that the witnesses were sixteen years of age or older and otherwise competent to be witnesses.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn and acknowledged before me by _____, the testator; and subscribed and sworn before me by _____ and _____, witnesses, this _____ day of _____, 19 __.

(Seal)

_____
Notary Public, or other officer authorized to take and certify acknowledgements and administer oaths.

[Iowa Code § 633.279]

APPENDIX IV[10]

Kansas Self-Proving Clause

STATE OF KANSAS
COUNTY OF _____

Before me, the undersigned authority, on this day personally appeared _____, _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me first duly sworn, said _____, testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament, and that he had willingly made and executed it as his free and voluntary act and deed for the purposes therein expressed; and the said witnesses, each of his oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of each other and in the presence of the testator and at his request, and that said testator at that time possessed the rights of majority, was of sound mind and under no restraint.

_____
Testator

_____
Witness

_____
Witness

Subscribed, acknowledged and sworn to before me by _____, testator, and _____ and _____, witnesses, this _____ day of _____, A.D., _____.

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

[Kan. Stat. §59-606]

APPENDIX IV[11]

Kentucky Self-Proving Clause

THE STATE OF _____
COUNTY OF _____

Before me, the undersigned authority, on this day personally appeared _____, _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn, _____ the testator, declared to me and to the witnesses in my presence that the instrument is his last will and that he had willingly signed or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence and hearing of the testator, that he signed the will as witness and that to the best of his knowledge the testator was eighteen years of age or over, of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn and acknowledged before me by _____, the testator, subscribed and sworn before me by _____ and _____, witnesses, this _____ day of _____, A.D., _____.

_____
(Official capacity of officer)

[Ky. Rev. Stat. § 394.225]

APPENDIX IV[12]

Minnesota Self-Proving Clause

THE STATE OF _____
COUNTY OF _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as a witness, and that to the best of his knowledge the testator was at the time 18 or more years of age, of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, 19 __.

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

[Minn. Stat. § 524.2-504]

APPENDIX IV[13]

Montana Self-Proving Clause

THE STATE OF _____
COUNTY OF _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his 'nowledge the testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witness, this _____ day of _____, _____.

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

[Mont. Rev. Codes Ann. § 91A-2-504]

APPENDIX IV[14]

Nebraska Self-Proving Clause

THE STATE OF _____
COUNTY OF _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen or more years of age or was not at that time a minor, and was of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____.

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

[Neb. Rev. Stat. § 30-2329]

APPENDIX IV[15]

New Mexico Self-Proving Clause

STATE OF NEW MEXICO
COUNTY OF _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he signed willingly, or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses saw the testator sign or another sign for him at his direction and, in the presence of the testator and in the presence of each other, signed the will as witness and that to the best of his knowledge the testator had reached the age of majority, was of sound mind and was under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, _____.

(Seal)

_____
Signed

_____
(Official capacity of officer)

[N.M. Stat. Ann. §32 A-2-504]

APPENDIX IV[16]

North Carolina Self-Proving Clause

STATE OF NORTH CAROLINA
COUNTY/CITY OF _____

Before me, the undersigned authority, on this day personally appeared _____, and ____, ____, and ____, known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn. The testator, declared to me and to the witnesses in my presence: that said instrument is his last will; that he had willingly signed or directed another to sign the same for him, and executed it in the presence of said witnesses as his free and voluntary act for the purposes therein expressed; or, that the testator signified that the instrument was his instrument by acknowledging to them his signature previously affixed thereto.

The said witnesses stated before me that the foregoing will was executed and acknowledged by the testator as his last will in the presence of said witnesses who, in his presence and at his request, subscribed their names thereto as attesting witnesses and that the testator, at the time of the execution of said will, was over the age of 18 years and of sound and disposing mind and memory.

_____
Testator

_____
Witness

_____
Witness

_____
Witness

Subscribed, sworn and acknowledged before me by _____, the testator, subscribed and sworn before me by _____, _____, and _____, witnesses, this _____ day of _____, A.D., _____.

(Seal)

_____
Signed

_____
Official Capacity of Officer

[N.C. Gen. Stat. §31-11.1]

APPENDIX IV[17]

North Dakota Self-Proving Clause

THE STATE OF _____
COUNTY OF _____

I, _____, the testator, sign my name to this instrument this _____ day of _____, _____, and being first sworn, declare to the undersigned authority that I sign and execute this instrument as my last will, that I sign it willingly or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

We, _____, and _____, the witnesses, sign our names to this instrument, and being first sworn, declare to the undersigned authority that the testator willingly directed another to sign for him, that each of us, in the presence and hearing of the testator, signs this will as a witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

Subscribed, sworn to, and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of _____.

(Seal)

_____
Signed

_____
(Official capacity of officer)

[N.D. Cent. Code §30.1-08-04]

APPENDIX IV[18]

Oklahoma Self-Proving Clause

The State of Oklahoma
County of _____

Before me, the undersigned authority, on this day personally appeared _____, _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument, in their respective capacities, and all of said persons being by me first duly sworn, said _____, testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament and that he had willingly made and executed it as his free and voluntary act and deed for the purposes therein expressed; and the said witnesses, each on his oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that he did sign the same as witness in the presence of the said testator and at his request and that said testator was at that time eighteen (18) years of age or over and was of sound mind.

_____
Testator

_____
Witness

_____
Witness

Subscribed and acknowledged before me by the said _____, testator, and subscribed and sworn before me by the said _____, and _____, witnesses, this _____ day of _____, A.D., _____.

(Seal)

_____
Signed

_____
(Official Capacity of Officer)

[Okla. Stat tit. 84, §55]

APPENDIX IV[19]

Pennsylvania Self-Proving Clause

Commonwealth of Pennsylvania
County of _____

I _____, testat- _____, whose name is signed to the attached or foregoing instrument, having been duly qualified according to law, do hereby acknowledge that I signed and executed the instrument as my Last Will: That I signed it willingly; and that I signed it as my free and voluntary act for the purposes therein expressed.

Sworn or affirmed to and acknowledged before me, by _____, the testator, this _____ day of _____, 19 __.

(Seal)

_____

_____
(Official capacity of officer)

Affidavit

Commonwealth of Pennsylvania
County of _____

We, _____, (_____,) and _____, the witnesses whose names are signed to the attached or foregoing instrument, being duly qualified according to law, do depose and say that we were present and saw testat- _____ sign and execute the instrument as his Last Will; that _____ signed willingly and that _____ executed it as _____ free and voluntary act for the purposes therein expressed; that each of us in the hearing and sight of the testat- _____ signed the will as witnesses; and that to the best of our knowledge the testat- _____ was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

Sworn or affirmed to and subscribed to before me by _____, _____, and _____, witnesses, this _____ day of _____, 19 __.

_____
Witness

_____
Witness

_____
Witness

(Seal)

_____

_____
(Official capacity of officer)

[20 Pa. Cons. Stat. §3132]

APPENDIX IV[20]

South Dakota Self-Proving Clause

THE STATE OF _____
COUNTY OF _____

We, _____, _____ and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen or more years of age, of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this ___ day of _____, ____.

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

[S.D. Compiled Laws Ann. §29-2-6.1]

APPENDIX IV[21]

Texas Self-Proving Clause

THE STATE OF TEXAS
COUNTY OF _____

Before me, the undersigned authority, on this day personally appeared _____, _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said _____, testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament, and that he had willingly made and executed it as his free act and deed for the purposes therein expressed; and the said witnesses, each on his oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testator and at his request; that he was at that time eighteen years of age or over (or, being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age.

_____
Testator

_____
Witness

_____
Witness

Subscribed and acknowledged before me by the said _____, testator, and subscribed and sworn to before me by the said _____, and _____, witnesses, this _____ day of _____, A.D. _____.

(Seal)

_____
Signed

_____
(Official capacity of officer)

[Tex. Prob. Code Ann.
(Vernon) §59]

APPENDIX IV[22]

Utah Self-Proving Clause

I, _____, the testator, sign my name to this instrument this _____ day of _____, 19 __, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes expressed in it, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

We, _____, and _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator and of each other, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

STATE of _____
COUNTY of _____

Subscribed, sworn to, and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of _____.

_____
Signed

_____
(Official capacity of officer)

[Utah Code Ann.
§75-2-504]

APPENDIX IV[23]

Virginia Self-Proving Clause

State of Virginia
County/City of _____

Before me, the undersigned authority, on this day personally appeared _____, _____, _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn, _____, the testator, declared to me and to the witnesses in my presence that said instrument is his last will and testament and that he had willingly signed or directed another to sign the same for him, and executed it in the presence of said witnesses as his free and voluntary act for the purposes therein expressed; that said witnesses stated before me that the foregoing will was executed and acknowledged by the testator as his last will and testament in the presence of each other, did subscribe their names thereto as attesting witnesses on the day of the date of said will, and that the testator, at the time of the execution of said will, was over the age of 18 years and of sound and disposing mind and memory.

_____
Testator

_____
Witness

_____
Witness

_____
Witness

Subscribed, sworn and acknowledged before me by _____, the testator, subscribed and sworn before me by _____, _____, and _____ witnesses, this _____ day of _____, A.D., _____.

(Seal)

_____
Signed

_____
(Official capacity of officer)

[Va. Code §64.1-87.1]

APPENDIX V

SOLDIERS' AND SEAMEN'S WILLS

Note: In referring to this chart, each lawyer should recognize that state statutes are frequently amended, and that state court decisions interpret each statute. The author has relied on the statutes themselves in drafting this chart.

State	Recognize	Monetary Type Property	Limit	Limitation
ALABAMA (Common Law Principles)	Yes	—	—	—
Ala. Code tit. 43	§43-1-35	—	—	—
ALASKA (UPC)*	Yes	Wages & Personal Property	None	At sea or in military service.
Alaska Stat.	§13.11.158	13.11.158	13.11.158	13.11.158
ARIZONA (UPC)	No	—	—	—
ARKANSAS	No	—	—	—
CALIFORNIA	Yes	Personal Property	$1,000	Actual contemplation, fear, or peril of death.
Ca. Prob. Code (West)	§55	55	55	55
COLORADO (UPC)	No	—	—	—
CONNECTICUT	No	—	—	—
DELAWARE	No	—	—	—
DISTRICT OF COLUMBIA	Yes	Personal Property	None	Actual military service and at time of last illness.
D.C. Code	§18-107	18-107	18-107	18-107
FLORIDA	No	—	—	—
GEORGIA	No (but recognizes nuncupative will)	No limits	None	Last sickness.
Ga. Code	§113-502	—	—	113-502
HAWAII (UPC)	No	—	—	—
IDAHO (UPC)	No	—	—	—
ILLINOIS	No	—	—	—
INDIANA	Yes	Personal Property	$1,000 ($10,000-active mil. service during time of war)	Imminent Peril of death.
Ind. Code (Burns)	§29-1-7-12	29-1-7-12	29-1-7-12	
IOWA	No	—	—	
KANSAS	Yes	Personal Property	—	Last sickness.
Kan. Stat.	§59-608	59-608	—	59-608
KENTUCKY	Yes	Personal Property	None	In actual service within 10 days of death.
Ky. Rev. Stat.	§394.050	394.050	—	394.050

State	Recognize	Monetary Type Property	Limit	Limitation
LOUISIANA	Yes	None	None	Army in the field or military expedition.
La. Civ. Code Ann. Art. (West)	1597	—	—	1597
MAINE	Yes	Personal Estate & Wages	None	In actual service.
Me. Rev. Stat. tit. 18	§51	51	—	51
MARYLAND	No	—	—	—
MASSACHUSETTS	Yes	Personal Property	None	Actual military service.
Mass. Gen. Laws Ann. Ch. 191	§6	6	6	6
MICHIGAN	Yes	Wages and Personal Estate	None	Actual military service.
Mich. Comp. Laws	§702.6	702.6	702.6	702.6
MINNESOTA (UPC)	No	—	—	—
MISSISSIPPI	Yes	Real and Personal	None	18, active service in the Armed Forces.
Miss. Code Ann.	§91-5-21	91-5-21	91-5-21	91-5-21
MISSOURI	Yes	Personal Property	$500.00	Imminent peril of death.
Mo. Rev. Stat.	§474.350	474.350	474.350	474.350
MONTANA (UPC)	No	—	—	—
NEBRASKA (UPC)	No	—	—	—
NEVADA	Yes	—	$1,000	Made at the time of the last sickness.
Nev. Rev. Stat.	§133.100	133.100	133.100	133.100
NEW HAMPSHIRE	Yes	Movables and Personal Estate	None	Comon law rules.
N.H. Rev. Stat. Ann.	§551:15	551:15	551:15	551:15
NEW JERSEY	Yes	—	None	In writing, 18, active service, in time of war, or in time of emergency, or in time of warlike conditions.
N.J. Stat. Ann. (West)	§3A:3-5	3A:3-5	3A:3-5	3A:3-5
NEW MEXICO (UPC)	No	—	—	—
NEW YORK	Yes	—	None	Actual military service during a war, declared or undeclared, or other armed conflict.
N.Y. Est., Powers & Trusts Law (McKinney)	§3-2.2	3-2.2	3-2.2	3-2.2
NORTH CAROLINA	Yes	—	None	Last sickness or imminent peril.
N.C. Gen. Stat.	§31-3.5	31-3.5	31-3.5	31-3.5

State	Recognize	Monetary Type Property	Limit	Limitation
NORTH DAKOTA (UPC)	No	—	—	—
OHIO	Yes	Personal Estate	None	Last sickness.
Ohio Rev. Code Ann.	$2107.60	2107.60	2107.60	2107.60
OKLAHOMA	Yes	—	$1,000	Actual military service in the field and in actual contemplation, fear or peril of death.
Okla. Stat. tit. 84	§46	—	46	46
OREGON	No	—	—	—
PENNSYLVANIA	No	—	—	—
RHODE ISLAND	Yes	Personal Estate	—	Actual military service.
R.I. Gen. Laws	§33-5-6	33-5-6	—	33-5-6
SOUTH CAROLINA	Yes	Movables, Wages and Personal Estate	Common law	Actual military service.
S.C. Code	§19-206	19-206	19-206	19-206
SOUTH DAKOTA	Yes	—	$1,000	Actual military service and in actual contemplation, fear or peril of death.
S.D. Compiled Laws Ann.	§29-2-9	—	29-2-9	—
TENNESSEE	Yes	Personal Property	$10,000	Imminent peril of death and in time of war.
Tenn. Code Ann.	§32-106 & 32-205	32-106	32-106	32-106
TEXAS	Yes	—	None	Last sickness.
Tex. Prob. Code Ann. (Vernon)	§64	—	—	65
UTAH (UPC)	No	—	None	—
VERMONT	Yes	Wages and Personal Estate	None	Actual military service.
Vt. Stat. Ann. tit. 14	§7	7	—	7
VIRGINIA	Yes	Personal Estate	None	Actual military service.
Va. Code	§64.1-53	64.1-53	—	64.1-53
WASHINGTON	Yes	Wages or Personal	None	Last sickness.
Wash. Rev. Code	§11.12.025	11.12.025	—	11.12.025
WEST VIRGINIA	Yes	Personal Estate	None	Actual military service.
W. Va. Code	§41-1-5	41-1-5	—	41-1-5
WISCONSIN	No	—	—	—
WYOMING	No	—	—	—

— Indicates no statutory provision.
• UPC—Designates states which have adopted the Uniform Probate Code.

APPENDIX VI

ANCILLARY ADMINISTRATION

NOTE: In referring to this chart, each lawyer should recognize that state statutes are frequently amended, and that state court decisions interpret each statute. The author has relied on the statutes themselves in drafting this chart.

	Required for Real Property	Non-Domiciliary Qualifies as Executor
ALABAMA	Yes	No, except if, at the time he is the executor or administrator of the same estate in some other state, he is also duly qualified under the laws of that jurisdiction.
Ala. Code tit. 43	§43-2-192	§43-2-22
ALASKA (UPC)*	Yes	Yes
Alaska Stat. §	13.16	13.16.065
ARIZONA (UPC)	Yes	Yes
Ariz. Rev. Stat. §	14-3715	14-3203
ARKANSAS	Yes	No, unless he appoints clerk of court as agent to accept service of process.
Ark. Stat. Ann. §	62-2714	62-2201b
CALIFORNIA	Yes	Yes
Cal. Prob. Code § (West)	1041 & 630	405.1
COLORADO (UPC)	Yes	Yes
Colo. Rev. Stat. §	15-12-102	15-2-203
CONNECTICUT	Yes	Yes, if he appoints probate judge to be attorney for service of process.
Conn. Gen. Stat. §	45-236	52-60
DELAWARE	Yes	Yes, if he files irrevocable power of attorney designating Register to accept service of process.
Del. Code tit. 12, §	2701	1506
DISTRICT OF COLUMBIA	Yes	Yes, if appoint Register of Wills as agent for service of process.
D.C. Code §	20-1329	20-365
FLORIDA	Yes	No, unless a designated relative (i.e., child, spouse, etc.).
Fla. Stat. §	734.102	732.47
GEORGIA	Yes	Yes
Ga. Code §	113-708	113-1206
HAWAII (UPC)	Yes	Yes
Haw. Rev. Stat. §	560:3-102	560:3-203
IDAHO (UPC)	Yes	Yes
Idaho Code §	15-3-102	15-3-203
ILLINOIS	Yes	Yes
Ill. Ann. Stat. ch. 110 1/2, § (Smith-Hurd)	22-4	§6-13

	Required for Real Property	Non-Domiciliary Qualifies as Executor
INDIANA	Yes	No (but may serve as a joint personal representative with a resident personal representative).
Ind. Code § (Burns)	29-1-7-24	29-1-10-1
IOWA	Yes	No, unless a resident fiduciary is also appointed.
Iowa Code §	633.350	633.63
KANSAS	Yes	Yes
Kan. Stat. §	59-805	59-807(a)
KENTUCKY	Yes	Yes
Ky. Rev. Stat. §	395.020	395-005
LOUISIANA	Yes	Yes, if appointed a resident agent for service of process.
La. Civ. Code art.	3401	3097
MAINE	Yes	No, unless appoint agent or attorney in state.
Me. Rev. Stat. tit. 18, §	1410	1402
MARYLAND	Yes	Yes, if state resident appointed for service of process.
Md. Est. & Trusts Code Ann. §	5-506	5-105
MASSACHUSETTS	Yes	Yes, if appoints agent residing in state for service of process.
Mass. Gen. Laws Ann. ch. 199, §	1	ch. 195, §8
MICHIGAN	Yes	Yes, if appoints resident agent for service of process.
Mich. Comp. Laws	720.91	§704.27a
MINNESOTA (UPC)	Yes	Yes
Minn. Stat. §	524.3-102	524.3-203
MISSISSIPPI	No	Yes
Miss. Code Ann. §	622	91-7-35
MISSOURI	Yes	No
Mo. Rev. Stat. §	473.668	473.117
MONTANA (UPC)	Yes	Yes
Mont. Rev. Codes Ann. §	91A-3-102	91A-3-203
NEBRASKA (UPC)	Yes	Yes
Neb. Rev. Stat. §	30-2402	30-2412
NEVADA	—	No
Nev. Rev. Stat. §	—	139.010
NEW HAMPSHIRE	Yes	No, unless judge gives approval.
N.H. Rev. Stat. Ann. §	554:29	553:5
NEW JERSEY	Yes	Yes
N.J. Stat. Ann. § (West)	3A:8-11	3A:12-14

	Required for Real Property	Non-Domiciliary Qualifies as Executor
NEW MEXICO (UPC)	Yes	Yes
N.M. Stat. Ann.	32A-3-102	32A-3-203
NEW YORK	Yes	Yes
N.Y. Est., Powers & Trusts Law § (McKinney)	11-1.3	N.Y. Surr. Ct. Proc. §707 (McKinney)
NORTH CAROLINA	Yes	No, unless he appoints an agent who is a resident for service of process.
N.C. Gen. Stat. §	28A-26-6	28A-4-2
NORTH DAKOTA (UPC)	Yes	Yes
N.D. Cent. Code §	30.1-12-02	30.1-13-03
OHIO	Yes	No, unless surviving spouse or next of kin.
Ohio. Rev. Code Ann. § (Page)	2129.14	2109.21
OKLAHOMA	Yes	Yes
Okla. Stat. tit. 58, §	633	106
OREGON	Yes	Yes
Or. Rev. Stat. §	116.263	113.095
PENNSYLVANIA	—	Yes
20 Pa. Cons. Stat. §	—	§3157
RHODE ISLAND	—	No
R.I. Gen. Laws §	—	33-8-7
SOUTH CAROLINA	—	No, unless he is bonded and appoints agent for servie of process.
S.C. Code §	—	21-13-310
SOUTH DAKOTA	No, if value $60,000 or less.	Yes, but he must appoint resident agent for service of process.
S.D. Compiled Laws Ann. §	30-12-1	30-13-2
TENNESSEE	—	—
Tenn. Code. Ann.	—	—
TEXAS	—	No, unless he appoints resident agent for service of process.
Tex. Prob. Code Ann. § (Vernon)	—	78
UTAH (UPC)	Yes	Yes
Utah Code Ann. §	75-3-102	75-3-203
VERMONT	—	Yes, if he appoints resident agent for service of process.
Vt. Stat. Ann. tit. 14, §	—	904
VIRGINIA	—	No, unless he also appoints a resident to serve with.
Va. Code §	—	26-59
WASHINGTON	—	Yes
Wash. Rev. Code §	—	11.36.010

	Required for Real Property	Non-Domiciliary Qualifies as Executor
WEST VIRGINIA	Yes	No, except when close relative.
W. Va. Code §	44-11-1	44-5-3
WISCONSIN	—	Yes, if he appoints resident agent for service of process.
Wis. Stat. §	—	856.23
WYOMING	—	No
Wyo. Stat. §	—	2-95

— Indicates no statutory provision.

• UPC—Designates states which have adopted the Uniform Probate Code.

APPENDIX VII

POWER OF FOREIGN REPRESENTATIVE

NOTE: In referring to this chart each lawyer should recognize that state statutes are frequently amended and that state court decisions interpret each statute. The author has relied on the statutes themselves in drafting this chart.

	Can Collect Debts	Can Collect Bank Accts.	Conditions	Ancillary Administration Required
ALABAMA	Yes	—	By recording copy of out-of-state letters testamentary in probate court in county where property located, and by giving bond.	No
Ala. Code tit. 43	§43-2-211	—	43-2-211	43-2-21
ALASKA (UPC)*	Yes	Yes	1. At least 60 days after death. 2. Proof of appointment. 3. Affidavit: a. date of death of nonresident. b. no local administration. c. entitled to payment. 4. No objection by local creditors.	No
Alaska Stat. §	13.21.015	13.21.015	13.21.015 & 13.21.025	13.21.035
ARIZONA (UPC)	Yes	Yes	1. At least 60 days after death. 2. Proof of appointment. 3. Affidavit: a. date of death of nonresident. b. no local administration. c. entitled to payment. 4. No objection by local creditors.	
Ariz. Rev. Stat. §	14-4201	14-4201	14-4201 & 14-4203	14-4205
ARKANSAS	—	—	—	—
Ark. Stat. Ann. §	—	—	—	—
CALIFORNIA	Yes	Yes	1. Notice in newspaper. 2. After 3 months and no objections must give to debtor: a. affidavit as to valid letters; b. authenticated copy of letters; c. consent of state Controller to transfer;	No

	Can collect Debts	Can collect Bank Accts.	Conditions	Ancillary Administration Required
			d. an affidavit showing publication of required notice.	
Cal. Prob. Code § (West)	1043	1043	—	—
COLORADO (UPC)	Yes	Yes	1. At least 60 days after death. 2. Proof of appointment. 3. Affidavit: a. date of death of nonresident. b. no local administration. c. entitled to payment. 4. No objection by local creditors.	No
Colo. Rev. Stat. §	15-4-201	15-4-201	15-4-201 & 15-13-203	15-13-205
CONNECTICUT	—	—	—	—
Conn. Gen. Stat. §	—	—	—	—
DELAWARE	Yes	Yes	1. At least 60 days after death of decedent. 2. Affidavit from foreign rep.: a. date of death of non-resident. b. no local or ancillary administration. c. Personal foreign rep. entitled to payment. 3. No objection by local creditors.	
Del. Code tit. 12, §	1562	1562	1562 & 1564	1566
DISTRICT OF COLUMBIA	—	—	—	—
D.C. Code §	—	—	—	—
FLORIDA	Yes	Yes	1. No written demand from personal representative appointed in Florida. 2. 60 days after foreign personal representative has been appointed.	No
Fla. Stat. §	734.101	734.101	734.101	734.101
GEORGIA	—	Yes	None	—
Ga. Code §	—	113-2406	—	—
HAWAII (UPC)	—	—	—	Yes
Haw. Rev. Stat. §	—	—	—	560:4-207
IDAHO (UPC)	Yes	Yes	1. At least 60 days after death. 2. Proof of appointment.	No

	Can Collect Debts	Can Collect Bank Accts.	Conditions	Ancillary Administration Required
			3. Affidavit a. date of death of nonresident. b. no local administration. c. entitled to payment. 4. No objection by local creditors.	
Idaho Code §	15-4-201	15-4-201	15-4-201 & 15-4-203	15-4-205
ILLINOIS	Yes	Yes	1. By giving affidavit to debtor: a. no creditors. b. no letters issued or pending in Illinois. 2. By giving debtor copy of letters.	No
Ill. Ann. Stat. c. 110 1/2, § (Smith-Hurd)	22-1	22-1	22-1	22-1
INDIANA	Yes	Yes	1. At least 45 days after death of non-resident. 2. Affidavit by foreign rep. stating: a. date of death of non-resident. b. no local administration. c. Foreign personal rep. entitled to payment. 3. No objection by local creditors.	No
Ind. Code § (Burns)	29-2-1-2	29-2-1-2	29-2-1-2 & 29-2-1-4	29-2-1-6
IOWA	Yes	Yes	Must file statement that no fiduciary, receiver, referee, asignee or commissioner has been appointed and qualified in Iowa.	No
Iowa Code §	633.144	633.144	633.144	633.144
KANSAS	Yes	Yes	1. No demand made by pers. rep. appointed in Kansas. 2. 3 months after grant of letters to foreign personal rep. in another state. 3. Applies only to intangible personal property.	No
Kan. Stat. §	59-809	59-809	59-809	59-809
KENTUCKY	Yes	—	—	—
Ky. Rev. Stat. §	395.170	—	—	—
LOUISIANA	Yes	Yes	Must qualify in Louisiana court as a sucession representative.	Yes
La. Civ. Code Art.	3402	3402	3402	3402

	Can Collect Debts	Can Collect Bank Accts.	Conditions	Ancillary Administration Required
MAINE	Yes	Yes	1. No executor in Maine. 2. No objection by creditors. 3. 6 months after decedent's death. 4. All Maine inheritance taxes, if any, paid.	Yes
Me. Rev. Stat. tit. 18, §	1410	1410	1410	1410
MARYLAND	Yes	Yes	None	No
Md. Est. & Trusts Code Ann. §	5-502	5-502	5-502	5-502
MASSACHUSETTS	Yes	Yes	1. At least 60 days after death of non-resident. 2. Proof of status. 3. Affidavit: a. date of non-resident's death. b. no local administration. c. foreign personal rep. entitled to payment.	No
Mass. Gen. Laws Ann. Ch. 199A	$2	$2	$2	$6
MICHIGAN	—	Yes	1. Authenticated copies of letters. 2. Affidavit: a. no proceeding pending as to domicile. b. no proceeding pending in Mich. c. no Mich. creditors.	—
Mich. Comp. Laws §	—	720.91	—	—
MINNESOTA (UPC)	Yes	Yes	1. At least 60 days after death. 2. Proof of appointment. 3. Affidavit: a. date of death non-resident. b. no local administration. c. entitled to payment. 4. No objection by local creditors.	No
Minn. Stat. §	524.4-201	524.4-201	524.4-201 & 524.4-203	524-4-205
MISSISSIPPI	Yes	Yes	File certified copy of record of appointment.	No
Miss. Code Ann. §	622	622	622	622
MISSOURI	—	—	—	—
Mo. Rev. Stat. §	—	—	—	—

	Can Collect Debts	Can Collect Bank Accts.	Conditions	Ancillary Administration Required
MONTANA (UPC)	Yes	Yes	1. File authenticated copy of appointment and bond. 2. File inventory of property in Montana. 3. File affidavit: a. date of non-resident's death. b. no pending local administration. 4. Payment of inheritance tax or posting of bond to cover. 5. 60 days after death of non-resident decedent. 6. No resident creditor claim.	No
Mont. Rev. Codes Ann. $	91A-4-204	91A-4-204	91A-4-204, 91A-4-201, & 91A-4-206	91A-4-204
NEBRASKA (UPC)	Yes	Yes	1. At least 60 days after death. 2. Proof of appointment. 3. Affidavit: a. date of death of non-resident. b. no local administration. c. entitled to payment. 4. No objection by local creditors.	No
Neb. Rev. Stat. $	30-2502	30-2502	30-2502 & 30-2504	30-2502
NEVADA	—	—	—	—
Nev. Rev. Stat. $	—	—	—	—
NEW HAMPSHIRE	Yes	Yes	Must petition probate court. If no objection, probate judge can license.	No
N.H. Rev. Stat. Ann.	§554:28	554:28	554:28	554:28
NEW JERSEY	—	—	—	—
N.J. Stat. Ann. (West)	—	—	—	—
NEW MEXICO (UPC)	Yes	Yes	1. At least 60 days after death. 2. Proof of appointment. 3. Affidavit: a. date of death of non-resident. b. no local administration. c. entitled to payment. 4. No objection by local creditors.	No
N.M. Stat. Ann. $	32A-4-201	32A-4-201	32A-4-201 & 32A-4-203	32A-4-201

	Can Collect Debts	Can Collect Bank Accts.	Conditions	Ancillary Administration Required
NEW YORK	Yes	Yes	1. No resident creditors. 2. No ancillary administration in New York.	No
N.Y. Est. Powers & Trusts Law § (McKinney)	13-3.4	13-3.4	13-3.4	13-3.4
NORTH CAROLINA	Yes	Yes	1. At least 60 days after nonresident's death. 2. Certified copy of letters. 3. Affidavit: a. date of non-resident's death. b. no local administration. c. entitled to payment. 4. No resident creditors.	No
N.C. Gen. Stat. §	28A-26.2	28A-26.2	28A-26.2	28A-26.2
NORTH DAKOTA (UPC)	Yes	Yes	1. At least 60 days days after death. 2. Proof of appointment. 3. Affidavit: a. date of death of nonresident. b. no local administration. c. entitled to payment. 4. No objection by local creditors.	No
N.D. Cent. Code §	30.1-24-01	30.1-24-01	30.1-24-01 & 30.1-24-03	30.1-24-01
OHIO	Yes	Yes	No ancillary proceedings in Ohio.	No
Ohio Rev. Code Ann. § (Page)	2129.03	2129.03	2129.03	2129.03
OKLAHOMA	—	—	—	—
Okla. Stat. tit., §	—	—	—	—
OREGON	Yes	Yes	1. At least 3 mos. after death of nonresident. 2. Release from State Treasury. 3. Affidavit: a. date of non-resident decedent's death. b. no local administration. c. foreign personal rep. entitled to payment. 4. No resident creditor claim.	No
Or. Rev. Stat. §	116.263	116.263	116.263	116.263

	Can Collect Debts	Can Collect Bank Accts.	Conditions	Ancillary Administration Required
PENNSYLVANIA	Yes	Yes	1. File copy of appointment. 2. File affidavit stating estate owes no one in Pennsylvania. 3. One month after nonresident's death.	No
20 Pa. Cons. Stat. §	4101	4102	4101 & 4102	4101
RHODE ISLAND	Yes	Yes	None	No
R.I. Gen. Laws §	33-18-25	33-18-25	33-18-25	33-18-25
SOUTH CAROLINA	Yes	Yes	None	No
S.C. Code §	19-600	19-600	19-600	19-600
SOUTH DAKOTA	—	—	—	—
S.D. Compiled Laws Ann.	—	—	—	—
TENNESSEE	—	—	—	—
Tenn. Code Ann. §	—	—	—	—
TEXAS	—	—	—	—
Tex. Prob. Code Ann. § (Vernon)	—	—	—	—
UTAH (UPC)	Yes	Yes	1. At least 60 days after death. 2. Proof of appointment. 3. Affidavit: a. date of death of nonresident. b. no local administration. c. entitled to payment. 4. No objection by local creditors.	
Utah Code Ann. §	75-4-201	75-4-201	75-4-201 & 75-4-203	75-4-201
VERMONT	—	—	—	—
Vt.Stat. Ann. tit., §	—	—	—	—
VIRGINIA	Yes	Yes	1. At least 90 days after non-resident's death. 2. No notice of claim. 3. Less than $2,500.	No
Va. Code §	64.1-130	64.1-130	64.1-130	64.1-130
WASHINGTON	—	Yes	1. Notice in paper—for 3 weeks. 2. 90 days after 1st notice. 3. Consent of tax commission	
Wash. Rev. Code §	—	30.20.100 & 30.12.110	30.20.100 & 32.12.110	
WEST VIRGINIA	—	—	—	—
W. Va. Code §	—	—	—	—
WISCONSIN	—	—	—	—
Wis. Stat. §	—	—	—	—

	Can Collect Debts	Can Collect Bank Accts.	Conditions	Ancillary Administration Required
WYOMING	Yes	Yes	May receive voluntary payments.	No
Wyo. Stat. §	34-34	34-34	34-34	34-34

— Indicates no statutory provision.

* UPC—Designates states which have adopted the Uniform Probate Code.

APPENDIX VIII

POWER OF FOREIGN REPRESENTATIVE TO SUE

NOTE: In referring to this chart, each lawyer should recognize that state statutes are frequently amended and that state court decisions interpret each statute. The author has relied on the statutes themselves in drafting this chart.

	Permit Foreign Rep. to Sue	Conditions
ALABAMA	Yes	By recording copy of out-of-state letters testamentary in probate court in county where civil action brought and giving bond.
Ala. Code tit. 43,	§43-2-211	43-2-211
ALASKA (UPC)	Yes	If no local administration pending, must then file authenticated copies of non-domiciliary appointment and of any official bond given.
Alaska Stat. §	13.21.035	13.21.035
ARIZONA (UPC)	Yes	If no local administration pending, must then file authenticated copies of non-domiciliary appointment and of any official bond given.
Ariz. Rev. Stat. §	14-4205	14-4205
ARKANSAS	Yes	Must file bond before instituting suit.
Ark. Stat. Ann. §	27-805	27-805
CALIFORNIA	No	—
Cal. Civil Procedure Code § (West)	1913	—
COLORADO (UPC)	Yes	If no local administration pending, must file authenticated copies of non-domiciliary appointment and of any official bond given.
Colo. Rev. Stat. §	15-13-205	15-13-205
CONNECTICUT	No Noel v. St. Johnsbury Trucking Co. 147 F. Supp. 432 (1956)	— —
DELAWARE	Yes	—
Del. Code, tit 12,	§1566	—
DISTRICT OF COLUMBIA	Yes	Certified copy of letters testamentary.
D.C. Code §	20-1505	20-1505
FLORIDA	Yes	Produce authenticated copies of probated wills or letters of administration duly obtained in any state or territory of the United States.
Fla. Stat. §	734.101	734.101
GEORGIA	Yes	1. Regularly appointed in domiciliary estate. 2. No executor or administration appointed in Georgia.
Ga. Code §	113-2401	113-2401
HAWAII (UPC)	—	—
Haw. Rev. Stat. §	—	—

	Permit Foreign Rep. To Sue	Conditions
IDAHO (UPC)	Yes	If no local administration pending, must file authenticated copies of non-domiciliary appointment and of any official bond given.
Idaho Code $	15-4-205	15-4-205
ILLINOIS	Yes	1. No letters testamentary issued in Illinois. 2. Letters issued to foreign personal representative by another state. 3. Court may require bond.
Ill. Ann. Stat. ch. 110 1/2, $ (Smith-Hurd)	22-3	22-3
INDIANA	Yes	Must file authenticated copies of letters of appointment from other state and of any official bond given.
Ind. Code. $ (Burns)	29-2-1-6	29-2-1-6
IOWA	Yes	No administration or none pending in Iowa.
Iowa Code $	633.148	633.148
KANSAS	Yes	None
Kan. Stat. $	59-1708	—
KENTUCKY	Yes	1. Must give bond. 2. File letters testamentary from another state.
Ky. Rev. Stat. $	395.170	395.170
LOUISIANA	Yes	Must qualify in Louisiana court as a succession representative.
La. Civ. Code Art.	3403	3403
MAINE	—	—
Me. Rev. Stat. tit	—	—
MARYLAND	Yes	Subject to any statute or rule relating to non-resident.
Md. Est. & Trusts Code Ann. $	5-502	5-502
MASSACHUSETTS	Yes	1. No administration pending in Massachusetts. 2. File authenticated copies of appointment and bond.
Mass. Gen. Laws Ann. Ch. 199A,$	6	$5 & $6
MICHIGAN	—	—
Mich. Comp. Laws $	—	—
MINNESOTA (UPC)	Yes	If no local administration pending must file authenticated copies of non-domiciliary appointment and of any official bond given.
Minn. Stat. $	524.4-205	524.4-205
MISSISSIPPI	Yes	File certified copy of record of appointment.
Miss. Code Ann. $	622	622
MISSOURI	—	—
MO. Rev. Stat. $	—	—
MONTANA (UPC)	Yes	1. File authenticated copy of appointment and bond. 2. File inventory of property in Montana.

	Permit Foreign Rep. to Sue	Conditions
		3. File affidavit: a. date of non-resident's death. b. no pending local administration. 4. Payment of inheritance tax or posting of bond to cover. 5. 60 days after death of non-resident decedent. 6. No resident creditor claim.
Mont. Rev. Codes Ann. §	91A-4-207	91A-4-207
NEBRASKA (UPC)	Yes	If no local administration pending, must file authenticated copies of non-domiciliary appointment and of any official bond given.
Neb. Rev. Stat. §	30-2506	30-2505
NEVADA	—	—
Nev. Rev. Stat. §	—	—
NEW HAMPSHIRE	—	—
N.H. Rev. Stat. Ann.	—	—
NEW JERSEY	—	—
N.J. Stat. Ann. (West)	—	—
NEW MEXICO (UPC)	Yes	If no local administration pending, must file authenticated copies of non-domiciliary appointment and of any official bond given.
N.M. Stat. Ann. §	32A-4-205	32A-4-205 & 32A-4-204
NEW YORK	Yes	1. File copy of letters testamentary. 2. File an affidavit: a. decedent not indebted to resident of New York. b. 6 mos. since death and no ancillary administration filed.
N.Y. Est. Powers & Trust Law § (McKinney)	13-3.5	§13-3.5
NORTH CAROLINA	Yes	Must qualify as an ancillary personal representative.
N.C. Gen. Stat. §	28A-26-6	28A-26-3
NORTH DAKOTA (UPC)	Yes	If no local administration pending, must file authenticated copies of non-domiciliary appointment and of any official bond given.
N.D. Cent. Code §	30.1-24-05	30.1-24-05 & 30.1-24-05
OHIO	Yes	None
Ohio Rev. Code Ann. § (Page)	2113.75	2113.75
OKLAHOMA	Yes	Certified copy of letters testamentary.
Okla. Stat. tit. 58, §	262	§262
OREGON	No	—
Or. Rev. Stat. §	43.180	—
PENNSYLVANIA	Yes	1. File copy of appointment. 2. File affidavit stating estate owes no one in Pennsylvania.

	Permit Foreign Rep. to Sue	Conditions
		3. One month after non-resident's death.
20 Pa. Cons. Stat. &	4101	$4101
RHODE ISLAND	Yes	1. File copy of will and letter of appointment. 2. 6 months after appointment. 3. Sufficient bond. 4. 2 weeks notice. 5. No objection by creditors.
R.I. Gen. Laws $	33-18-26	33-18-26
SOUTH CAROLINA	—	—
S.C. Code $	—	—
SOUTH DAKOTA	Yes	None
S.D. Compiled Laws Ann.	$30-15-5	$30-15-5
TENNESSEE	Yes	Must qualify in Tennessee as administrator or executor.
Tenn. Code Ann. $	30-106	30-106
TEXAS	Yes	1. Notice by registered mail to all Texas creditors. 2. File letters testamentary. 3. No Texas administrator.
Tex. Prob. Code Ann. $ (Vernon)	107A	107A
UTAH (UPC)	Yes	If no local administration pending, must then file authenticated copies of non-domiciliary appointment and of any official bond given.
Utah Code Ann. $	75-4-205	75-4-205 & 75-4-204
VERMONT	—	—
Vt. Stat. Ann. tit.	—	—
VIRGINIA	No	—
Va. Code $	Moore v. Smith, 177 Va. 621, 15 S.E. 2d 48 (1941)	—
WASHINGTON	—	—
Wash. Rev. Code $	—	—
WEST VIRGINIA	—	—
W. Va. Code $	—	—
WISCONSIN	Yes	1. No executor appointed in Wisconsin. 2. File copy of appointment.
Wis. Stat. $	287.16	287.16
WYOMING	No	—
Wyo. Stat. $	34-34	—

— Indicates no statutory provision.

* UPC—Designates states which have adopted the Uniform Probate Code.

APPENDIX IX

SMALL ESTATE PROCEDURES

NOTE: In referring to this chart, each lawyer should recognize that state statutes are frequently amended and that state court decisions interpret each statute. The author has relied on the statutes themselves in drafting this chart.

	Has Small Estate Procedures	Limits Type Property	Limits Value
ALABAMA	Yes	Personal	$3,000
Ala. Code tit. 43	§43-2-690	43-2-693	43-2-693
ALASKA (UPC)*	Yes	All	Not greater than homestead allowance, exempt property, family allowance, costs and expenses of administration, funeral expenses, and last medical expenses.
Alaska Stat. §	13.16.690		13.16.690
ARIZONA (UPC)	Yes	All	Not greater than homestead allowance, exempt profit, family allowance, costs and expense of administration, funeral expenses, and last medical expenses.
Ariz. Rev. Stat. §	14-3973		14-3973
ARKANSAS	Yes	All	$6,500 plus homestead and statutory allowances for the benefit of the widow or minor children.
Ark. Stat. Ann. §	62-2127		62-2127
CALIFORNIA	Yes	Personal	Does not exceed $20,000 plus motor vehicle, amounts due from armed services, and salary due not in excess of $3,000.
Cal. Prob. Code (West)	§630		630
COLORADO (UPC)	Yes	All	Value of entire estate does not exceed value of personal property held by decedent, exempting property allowance, family allowance, cost of administration, funeral expenses, and expenses of last illness.
Colo. Rev. Stat. §	15-12-1203	15-12-1203	15-12-1203
CONNECTICUT	Yes	Personal	$5,000
Conn. Gen. Stat. §	45-266	45-266	45-266
DELAWARE	Yes	Personal	$7,500
Del. Code, tit. 12, §	2306	2306	2306
DISTRICT OF COLUMBIA	Yes	Personal	$2,500
D.C. Code §	20-2101 & 20-2102	20-2101 & 20-2102	20-2102 & 20-2101
FLORIDA	Yes	All or only personal property	$10,000 No limit if only personal property.
Fla. Stat. §	735.201	735.201 & 735.301	735.201 & 735.301
GEORGIA	Yes	Any, if died intestate, no debts, and heirs	None

	Has Small Estate Procedures	Limits Type Property	Limits Value
		have agreed to distribution.	
Ga. Code $	113-1232	113-1232	113-1232
HAWAII (UPC)	Yes	Personal	$700
Haw. Rev. Stat. $	560:3-1213	560:3-1213	560:3-1213
IDAHO (UPC)	Yes	All	Not greater than homestead allowance, exempt property, family allowance, costs and expense of administration, funeral expenses, and last medical expenses.
Idaho Code $	15-3-1203	15-3-1203	15-3-1203
ILLINOIS	Yes	Personal	$7,500
Ill. Ann. Stat. ch. 110 1/2 $ (Smith-Hurd)	25-1	25-1	25-1
INDIANA	Yes	All	Value of gross probate estate does not exceed the allowance, costs, and expenses of administration and reasonable funeral expenses.
Ind. Code $ (Burns)	29-1-8-3	29-1-8-3	29-1-8-3
IOWA	Yes	All	$10,000
Iowa Code $	321.47	321.47	321.47
KANSAS	Yes	All	Value of estate, exclusive of the homestead and allowances to spouse and minor children, does not exceed funeral expenses, expenses of last sickness, cost of administration, and debts having preference under the laws of the U.S. and Kansas.
Kan. Stat. $	59-1507	59-1507	59-1507
KENTUCKY	Yes	All	Where surviving spouse's exemption equals or exceeds the amount of probatable assets.
Ky. Rev. Sta. $	395.455	395.455	395.455
LOUISIANA	Yes	All	None
La. Civ. Code Art.	1013	1013	1013
MAINE	—	—	—
Me. Rev. Stat. tit.	—	—	—
MARYLAND	Yes	All	$5,000
Md. Est. & Trusts Code Ann. $	5-601	5-601	5-601
MASSACHUSETTS	Yes	Personal Property	$2000 plus motor vehicle.
Mass. Gen Laws Ann. ch. 195, $	16	16	16
MICHIGAN	Yes	All	$7,500
Mich. Comp. Laws $	708.39	708.39	708.39
MINNESOTA (UPC)	Yes	All	Estate does not exceed exempt homestead, allowances, cost and expenses of administration,

	Has Small Estate Procedures	Limits Type Property	Value
			funeral expenses, and hospital expenses of last illness.
Minn. Stat. §	524.3-1203	524.3-1203	524.3-1203
MISSISSIPPI	—		—
Miss. Code Ann §	—		—
MISSOURI	Yes	All	$5,000
Mo. Rev. Stat. §	473.097	473.097	473.097
MONTANA (UPC)	Yes	All	$1,500 or value of entire estate if it does not exceed homestead allowance, exempt property, family allowance, costs of administration, funeral expenses, and expenses of last illness.
Mont. Rev. Codes Ann. §	91A-3-1203	91A-3-1203	91A-3-1203
NEBRASKA (UPC)	Yes	All	Value of estate does not exceed homestead allowance, exempt property, family allowance, cost of administration, funeral expenses, and cost of last illness.
Neb. Rev. Stat. §	30-24, 127	30-24, 127	30-24, 127
NEVADA	Yes	All	$60,000
Nev. Rev. Stat. §	145.040	145.040	145.040
NEW HAMPSHIRE	Yes	Personal	$2,000
N.H. Rev. Stat. Ann. §	553:31-a	553:31-a	553:31-a
NEW JERSEY	Yes	All	$5,000—surviving spouse $2,500—no surviving spouse
N.J. Stat. Ann. (West)	3A:6-5 & 3A:6-6	3A:6-5 & 3A:6-6	3A:6-5 & 3A:6-6
NEW MEXICO (UPC)	Yes	All	Value of estate does not exceed family allowance, personal property allowance, costs of administration, and expenses of last illness.
N.M. Stat. Ann. §	32A-3-1203	32A-3-1203	32A-3-1203
NEW YORK	Yes	Personal	$5,000
N.Y. Surr. Ct. Proc. Act. § (McKinney)	1301	1301	1301
NORTH CAROLINA	Yes (If die intestate)	Personal	$5,000
N.C. Gen. Stat. §	28A-25-1	28A-25-1	28A-25-1
NORTH DAKOTA (UPC)	Yes	All	Value of estate does not exceed homestead, exempt property, family allowance, cost of administration, funeral expenses, and expenses of last illness.
N.D. Cent. Code §	30.1-23-03	30.1-23-03	30.1-23-03
OHIO	Yes	All	$15,000
Ohio Rev. Code Ann. § (Page)	2113.03	2113.03	2113.03

	Has Small Estate Procedures	Limits Type Property	Limits Value
OKLAHOMA	Applies only to personalty of intestate ward.		
Okla. Stat. tit. 50, §	631		
OREGON	Yes	All	No limit if all of estate, after payment of claims, taxes, and expenses of administration, is set aside for support of spouse and dependent children.
Or. Rev. Stat. §	114.085	114.085	114.085
PENNSYLVANIA	Yes	Personal	$10,000
20 Pa. Cons. Stat. §	3102	3102	3102
RHODE ISLAND	Yes	Personal	$4,000
R.I. Gen. Laws §	33-24-1	33-24-1	33-24-1
SOUTH CAROLINA	Yes (if died intestate)	Personal	$5,000
S.C. Code §	19-555	19-555	19-555
SOUTH DAKOTA	Yes	All	$60,000
S.D. Compiled Laws Ann. §	30-11-1	30-11-1	30-11-1
TENNESSEE	Yes	Personal	$6,000
Tenn. Code Ann. §	30-2004	30-2004	30-2004
TEXAS	Yes	All	$10,000 plus homestead and exempt property.
Tex. Prob. Code Ann. § (Vernon)	137	137	137
UTAH (UPC)	Yes	All	Value of estate does not exceed homestead allowance, exempt property, family allowance, costs of administration, funeral expenses, and expenses of last illness.
Utah Code Ann. §	75-3-1203	75-3-1203	75-3-1203
VERMONT	Yes	Personal	$10,000
Vt. Stat. Ann. tit. 14, §	1902	1902	1902
VIRGINIA	—		—
Va. Code §	—		—
WASHINGTON	Yes	All	If estate solvent.
Wash. Rev. Code §	11.68.010	11.68.010	11.68.010
WEST VIRGINIA	—		—
W. Va. Code §	—		—
WISCONSIN	Yes	All	Estate is solvent or $10,000
Wis. Stat. §	867.01	867.01	867.01
WYOMING	—		—
Wyo. Stat. §	—		—

— Indicates no statutory provision.

• UPC—Designates states which have adopted the Uniform Probate Code.

APPENDIX X

(For a Will Previously Attested)

THE STATE OF _____
COUNTY OF _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of _____, _____.

_____
(Seal)

_____
Signed

_____
(Official capacity of officer)

WITHHOLDING OF STATE AND LOCAL INCOME TAXES FROM MILITARY PAY

by Lieutenant Colonel David C. Cummins**

Federal tax reform legislation enacted in 1976 and 1977 provides that, at the request of state and local governments, money may be withheld by federal finance offices from military pay for payment of state and local income taxes. Many states have made use of this option.

Major Cummins considers the implications of these provisions of law in light of the fact that identification of state of residence is often a complicated matter for military personnel. In particular, he notes that military taxpayers could find themselves subject to taxation by more than one state or locality.

Major Cummins recommends to legal assistance officers that they advise clients to take steps to clarify their legal residence, even if it means paying state and local taxes when none have been paid before.

I. INTRODUCTION

The amendments to the federal tax laws proceed apace, with consequent disruption, required re-education, and mental and economic

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*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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adjustment as the inevitable if unwanted progeny. The Tax Reform Act of 1976 and the Tax Reduction and Simplification Act of 1977 are the latest enactments. They directly affect military personnel in a number of ways, but certainly one of the most important concerns withholding of state and local income taxes from military pay.

Section 1207 of the Tax Reform Act of 1976,[1] and § 408 of the Tax Reduction and Simplification Act of 1977,[2] together provide that, at the request of state governments, active duty military personnel may be subject to withholding and remission of applicable state and District of Columbia income taxes from their military pay. Further, at the request of state or local governments, members of the Ready Reserve and National Guard may be subject to withholding and remission of applicable state, District of Columbia, and also city and country income taxes. This new legislation does not affect the power of state and local governments to levy a tax upon the receipt or accrual of income by military personnel.

II. JURISDICTIONAL BASES FOR TAXATION

The jurisdictional bases for the imposition of state and local income taxes are twofold, residential[3] and territorial. Viewed with reference to income received or accrued for the rendering of personal services, the first basis focuses on the political and legal relationship, or relational status, between the taxing authority and the performer of services. The second basis focuses on the place where the transaction occurs (i.e., employment or conduct of business activities) by means of which the services are performed.

An individual who is domiciled within a state or a political subdivision and who earns income by rendering personal services

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[1] Pub. L. No. 94-455, § 1207, 90 Stat. 1520, at 1704-1705 (amending 5 U.S.C. §§ 5516, 5517 (1976)).

[2] Pub. L. No. 95-30, § 408, 91 Stat. 126 at 157 (amending 5 U.S.C. § 5520 (1976).

[3] Domicile, or something akin to it, is generally known as "legal residence" or "residence for state or local government tax purposes." Less meaningfully, domicile has also been defined as "bona fide residence" or "fixed place of residence" or "permanent place of abode." *See* note 76, *infra*.

within that jurisdiction is clearly subject to the personal[4] income tax levy of that jurisdiction. Additionally, it has been clear for many years that there is no constitutional impediment to taxation by the state of domicile with respect to income derived by the domiciliary from services rendered outside that state.[5] The relational status of domicile or residence is sufficient to support the levy.

It is just as clear that, on the territorial jurisdiction basis, a state may consitutionally tax the personal income of nonresidents or nondomiciliaries when that income is earned or received from sources within the state.[6] The economic activity which is the occasion for the receipt or accrual of income occurs within the territorial boundaries of the state and that fact is sufficient to support the levy.

It necessarily follows that, if income is earned outside the resident or domiciliary government's territory, there is a possibility of multiple taxation. The due process clause of the 14th Amendment offers no protection against such multiple taxation,[7] notwithstanding that there is a due process distinction between the taxing power of a domiciliary government and that of a nondomiciliary government. That distinction is often referred to as the nexus or sufficiency of contacts between the taxing entity and the subject of the tax, or, more graphically, the correlation between a taxing entity's right to tax and the opportunities it has provided for, the protection it has afforded to, and the benefits it has conferred upon the taxpayer.[8]

From a federal constitutional viewpoint, as long as the domiciliary or resident taxpayer and the nondomiciliary or nonresident taxpayer are each afforded equal protection under the law, and no unreasonable or discriminatory burden is placed on interstate com-

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[4]Personal income taxes are to be distinguished from net or gross income taxes levied solely against business organizations. These latter taxes include corporate income taxes, franchise taxes measured by income, and unincorporated business organization taxes.

[5]"[D]omicile in itself establishes a basis for taxation." Lawrence v. State Tax Comm'n, 286 U.S. 276 at 279 (1932); New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

[6]Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920); Shafer v. Carter, 252 U.S. 37 (1920).

[7]Guar. Trust Co. v. Virginia, 305 U.S. 19 (1938).

[8]Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940).

mercial activity, and citizens of one state are accorded the privileges and immunities of citizens in all the other states, the potential for multiple taxation exists. Multiple taxation is not per se unconstitutional and it will be so only if it yields an impermissible result.

Given this context, it might seem that multiple taxation of income would be pervasive. While it does exist, it is relatively confined because of: (1) federal protective legislation; (2) state and local governments not exercising their full constitutional powers of taxation; (3) deference to other taxing entities by granting credit for taxes paid to them;[9] and (4) attempts to share a single total tax burden by allocation[10] or apportionment of the income base between taxing entities.

III. TAXATION OF MILITARY INCOMES

Turning specifically to armed forces personnel, the Buck Act[11] is the opposite of protective legislation because it provides that federal employees' income earned while residing on post or earned through performance of services on a federal post or reservation is not immune from state and local government income taxation. The statute makes reference to both the tax-significant factors, residence of the taxpayer and the territory where services are performed.

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[9] The most typical credit is that granted by a state to its domiciliaries or residents for taxes paid by them to other states which tax on a territorial basis. Such a credit defers to the treasury of the territorial basis state. But a liability is still due the state of domicile or residence if its tax is more onerous.

Some states also offer a credit to nondomiciliaries or nonresidents for taxes paid by them to their state of domicile or residence, but usually only if the latter state reciprocates. The effect of this credit is to defer to the treasury of the state of domicile or residence, but only if that state has a similar policy of deference. Here again, a liability still exists if the crediting state's tax is more onerous. U.S. Advisory Comm'n on Intergovernmental Relations, Federal-State Coordination of Personal Income Taxes 27–29, 142–48 (1965).

[10] When the measure of the tax is net income, the allocation can be either or both of two things. It may be, first, an exemption from inclusion in gross income or, second, a grant of a deduction referable to the contact with the other state.

[11] Codified at 4 U.S.C. §§ 105–111 (1976).

The purpose of the Buck Act is to equate federal agents and employees with privately employed off-post persons, and to permit no distinction according to whether the federal government has exclusive or only concurrent jurisdiction over the post. The rationale is that the post should not be a refuge where federal agents and employees can avoid bearing the reasonable fiscal burdens of the states and their political subdivisions.

The Buck Act states in relevant part,

> No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.[12]

Since armed forces personnel, in response to their military orders, travel to and reside within the jurisdiction of many different states and local governments during their periods of service, it was apparent to Congress that their presence at these locations could yield a proliferation of governmental claims asserting, on the one hand, either a domiciliary or resident status, or, on the other hand, a power to tax the military pay of the itinerant nonresident servicemember within the territory where he or she is stationed. It was because of that assumption, and with a view toward protecting the servicemember, that § 514 of the Soldiers' and Sailors' Civil Relief Act was enacted.[13] This legislation sought to minimize the risk of multiple taxation of service personnel and to protect their assertion of a more permanent domicile than their rotating duty stations might indicate.

The second sentence of the statute prevents taxing entities from using territorial jurisdiction to tax military pay as freely as they might otherwise be inclined to do:

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[12] 4 U.S.C. § 106(a) (1976).
[13] 50 U.S.C. App. § 574 (1970). The basic statute was first enacted in 1940 and was amended in 1942 and 1962.

> For the purposes of taxation in respect to the . . . income or gross income of any such person by any State . . . or political subdivision . . . or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State . . . political subdivision, or District . . . .[14]

As a result of the foregoing prohibition, domicile or residency is the only jurisdictional basis available for taxation of the military pay of servicemembers on extended active duty.

The first sentence of the statute is consistent with the above, in providing that domicile or residence for tax purposes is not lost by reason of absence from an area due to compliance with military orders, nor is domicile or residence for tax purposes gained or acquired by presence within an area due to compliance with military orders. Assertions of a power to tax military pay by reason of domiciliary or resident status are not prohibited; but the jurisdiction for such assertions cannot be absence from one place or presence in another place when that absence or presence is required for the performance of military service.

At first glance, then, it would appear that through protective federal legislation the servicemember on active duty is relieved from all risk of multiple state or local government income taxation on his pay. This is substantially but not entirely true, because of varying definitions of "residence" within the state tax statutes and the local government tax ordinances. If "residence" always meant domicile, as it does in some states, then there would be no risk of multiple taxation because every person has a domicile somewhere and, at any given moment for a given purpose, he has only one domicile. If "residence" always meant domicile plus some additional factor such

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[14] *Id.* The statute refers only to military pay. Claims of state taxation authorities based upon territorial jurisdiction can still be asserted against other types of income, such as interest on savings accounts, dividends, rental income, pay for a part-time job, and all income of the servicemember's spouse. *See generally* Curtis, *State Taxation of Servicemen*, 7 A.B.A. Law Notes 61 (Jan. 1971); Flick, *State Tax Liability of Servicemen and Their Dependents*, 21 Wash. & Lee L. Rev. 22 (1964); Lilly, *State Power To Tax The Service Member: An Examination of Section 514 of the Soldiers' and Sailors' Civil Relief Act*, 36 Mil. L. Rev. 123 (1967).

as maintenance of a place of abode within the territory of the taxing entity, as it does in some states, then again there would be no risk of multiple taxation, for the same reason. But if "residence" sometimes means something less than domicile, as is true in some states, then it is conceivable that there could be legitimate multiple claims by both a state of residence and a state of domicile. Aside from elimination of this slight risk of multiple taxation, the effect of the federal protective legislation in the form of § 514 of the Soldiers' and Sailors' Civil Relief Act is to protect the servicemember from the risk of multiple state and local government income taxation on his pay.

There is sentiment for repeal of this protective legislation.[15] The logic of the repeal position is somewhat similar to that which gave rise to the federally-impacted area legislation which provides for payments by the federal government to state and local governments in lieu of taxes. If extended by analogy to armed forces personnel, the rationale would be that they should bear their fair share of the fiscal burden of the area in which they actually live and where they enjoy the benefits of public expenditures. One could only hope that there would be some proviso added to the repealer which would require the domiciliary state and local government to defer to the territorial state and local government and thus avoid multiple income taxation in that fashion. The portent of repeal is real, not imagined, and is seriously addressed in at least one recent law review article.[16]

To what extent do state income tax statutes apply to military personnel who are domiciled or resident in the state but are serving under military orders elsewhere? Among the forty states, Alaska was until recently the only state which made no attempt to tax income of residents or domiciliaries when earned outside the state.[17] Now there are none since Alaska currently uses federal taxable income as the base for its tax against residents,[18] thus necessarily including income earned outside Alaska. However, the state grants a credit to residents for taxes paid to other states on income derived from sources within those other states.[19]

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[15] U.S. Advisory Comm'n on Intergovernmental Relations, Report A-50, State Taxation of Military Income and Store Sales (July 1976).
[16] Losey, *Multiple State Taxation of Military Income*, 19 A.F. L. Rev. 38 (1977).
[17] Alaska Stat. §43.20.010(a) (1971).
[18] *Id.*, § 43.20.031(a) (1977).
[19] *Id.*, § 43.20.061(a) (1977).

Since domiciliary states uniformly reach beyond their borders, to what extent do they grasp the military pay of armed forces personnel? The statutes fall into five major categories: First, some statutes exempt all military pay,[20] thus stating an outright preference for this occupational group. Second, others exempt certain types of military pay, such as combat pay, or specified amounts or percentages of total pay.[21] These statutes enunciate a less generous but nonetheless clear preference for this occupational group. Third, certain statutes exempt all military pay if the servicemember is permanently or indefinitely stationed outside the state.[22] These stat-

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[20] *E.g.*, "(b) The following exemptions are allowed in computing taxable income under this section: (1) service pay received by members of the armed forces of the United States or auxiliary branches of the armed forces; . . ." Alaska Stat. § 43.20.031 (1977).

[21] [It is] provided, however, that money paid by the United States to a person as compensation for active service as a member of the armed forces of the United States in a combat zone designated by executive order of the President of the United States shall not be subject to income taxes levied by the State of Alabama. . . .

Ala. Code tit. 51§ 374 (1977).

The taxable income of an individual. . . shall be: k. Reduced by any amount, up to a maximum of one thousand dollars, received by any person as payment for services performed while on active duty in the armed forces of the United States or as payment for attending periodic training meetings for drill and instruction as a member of the national guard or of a reserve unit of the armed forces of the United States.

N.D. Cent. Code § 57-38-01.2(1) (1977).

[22] Federal taxable income is adjusted:

[i]n the case of an individual who is on active duty as a full-time officer, enlistee, or draftee, with the armed forces of the United States, which full time duty is or will be continuous and uninterrupted for one-hundred-twenty (120) consecutive days or more, [by] deduct[ing] compensation paid for services performed outside this state by the armed forces of the United States; . . . .

Idaho Code § 63-3022(j) (1977).

Under California law, a nonresident is every individual who is not a resident.

(a) "Resident" includes: . . . (2) Every individual domiciled in this state who is outside the state for a temporary or transitory purpose.

(b) Any individual . . . who is domiciled in this state shall be considered outside this state for a temporary or transitory purpose while such individual:. . . (3) Holds an appointive office in the executive branch of the government of the United States (other than the armed forces of the United States . . .) . . . .

utes demonstrate self-restraint on the part of the states involved, acknowledging that an indefinite or long-term sojourn away from the domiciliary state has reduced the intensity of contacts with that state. Fourth, some statutes exempt all military pay if the servicemember is a "nonresident." A nonresident is one who has no permanent place of abode in the exempting state but maintains one in another state. Further, the nonresident may spend no more than a certain number of days, for example, 30 days, within the exempting state during the tax year.[23] Again, such states are exercising a measure of self-restraint when the intensity of contact with the domiciliary state has been drastically reduced. Fifth and finally, some states do not exempt military pay but rather treat it as the equivalent of any other type of income earned outside the state by a domiciliary.[24]

IV. PROBLEMS OF TAX COLLECTION

This complete lack of uniformity has led to uneven levels of collection by the many taxing entities, and uneven levels of compliance by

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(c) Any individual who is a resident of this state continues to be resident even though temporarily absent from the state.

Calif. Rev. & Tax. Code § 17014 (West) (1977). The 1975 California Income Tax Instructions, para. D, interprets this statute as follows: "California military personnel are considered nonresidents for state income tax purposes when serving at out-of-state posts of duty under permanent military orders."

[23] "A resident individual means an individual: (1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in the state. . . ." N.Y. Tax Law § 605(a) (McKinney) (1977).

[24] A resident of Iowa who is on active duty in the armed forces of the United States, as defined in Title 10, United States Code, section 101, for more than six continuous months, shall not include any income received for such service performed . . . prior to January 1, 1977, in computing taxes imposed by this section.

The taxes imposed under this Act shall be terminated upon either of two conditions: (1) When universal compulsory military service is reinstated by the United States Congress, or (2) When a state of war is declared to exist by the United States Congress.

Iowa Code Ann. § 422.5 (West) (1977). In this fashion a pre-1977 exemption is now lost.

military personnel who should be taxpayers. Another significant factor in compliance has been governmental reliance on withholding, i.e., income tax collection on wages at the source. It is administratively possible to enforce withholding on employers operating within the state and thus to collect income taxes on wages of their employees, whether resident or nonresident. At the same time it is administratively difficult to obtain withholding by out-of-state employers on wages of employees who are in-state residents. Recognition of this difficulty by state governments has been a stimulus toward allowing residents a credit for income taxes paid to another state. Provision for such allowance is now made in every state that has a broad-based income tax.[25]

An opportunity to effect a major increase in compliance, and at the same time a reduction in the state costs of collection, has gone unheeded. In 1972, when Congress adopted revenue sharing,[26] it also adopted a companion act, the Federal-State Tax Collection Act of 1972,[27] which authorizes the federal collection and administration of state individual income taxes. The Internal Revenue Service would collect the state tax in "piggyback" fashion together with the federal tax, and remit the revenue to the state.

No state has yet accepted Congress' generous offer, in part because of the Treasury's delay in adopting regulations. However, this delay is now ended, since proposed regulations were filed on September 29, 1978, and were adopted without change on December 19, 1978.[28] Other substantial reasons for state caution[29] lead one to predict that few states will seize the opportunity for federal collection and administration.

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[25] [1967] 37 State Tax Rev. (CCH) No. 51.

[26] State & Local Fiscal Assistance Act of 1972, §§ 101–144, Pub. L. No. 92–512, 86 Stat. 919. Most of its provisions are uncodified.

[27] Sections 201–204, Pub. L. No. 92–512, 86 Stat. 945, codified at I.R.C. §§ 6361–6365 (26 U.S.C. §§ 6361–6365 (1976)). This statute was amended by the Tax Reform Act of 1976, § 2116(c), subsec. (a), Pub. L. No. 94–455, 90 Stat. 1834, to make clear that there would be no charge for federal collection and administration. I.R.C. § 6361(a) (1976).

[28] The proposed regulations were first published at 42 Fed. Reg. 51,790 (1977). Their adoption is recorded at 43 Fed. Reg. 59,356 (1978).

[29] These reasons are thoroughly discussed in Note, *The Federal Collection of State Individual Income Taxes*, 3 Fordham Urb. L. J. 579 (1975); and Stolz & Purdy, *Federal Collection of State Individual Income Taxes*, 1977 Duke L. J. 59.

The legislation does not apply to local income taxes, nor to corporate income taxes, nor to income taxes using a measure or base other than a federal income tax measure or base, nor to income taxes that use federal gross income or adjusted gross income as a measure or base, nor to income taxes that use federal net income (adjusted gross income less deductions other than the exemption deductions) as a measure or base. In short, the state individual income taxes that qualify for federal collection and administration are as follows. First, taxes qualify that use federal taxable income as a base, thus permitting a state-created proportional or progressive rate structure. Second, taxes qualify that use a specific percentage of federal tax liability,[30] thus necessarily adopting the federal system of credits and the federal progressive rate structure.[31]

The legislation[32] and implementing proposed regulations[33] attempt a uniform definition of residence as a jurisdictional basis for state income taxation. The purposes are to promote ease of administration by the Internal Revenue Service and to avoid gaps in collection of revenue from residents who earn income out of state. The statutory standard, "principle place of residence . . . for a period of at least 135 consecutive days," is interpreted by the regulations to mean "the place which is an individual's primary home."[34] This interpretation yields the possibility that a taxpayer could be a resident of two or more states during a single taxable year and thus be taxable by each according to time spent therein.[35] The combination of these definitions and the expressly preserved[36] § 514 of the Soldiers' and Sailors' Civil Relief Act means that the domicile[37] of military personnel would control their residence status for taxation of military pay.[38] However, their nonmilitary income would be subject to a nonresident state tax but not subject to a tax by the state of residence since the "primary home" would usually be at or near the duty station.

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[30] Only Nebraska, Rhode Island and Vermont presently impose income taxes which are a percentage of federal tax liability.
[31] I.R.C. § 6362 (1976).
[32] *Id.*, § 6362(e)(1).
[33] Treas. Reg. § 301.6362-6 (1978).
[34] *Id.*, § 301.6362-6(b)(2)(i) (1978).
[35] I.R.C. § 6362(e)(4) (1976).
[36] *Id.*, § 6362(f)(8).
[37] *Id.*, § 6362(e)(1)(B).

[38] This would be a benefit for military personnel, because even the present slight risk of multiple taxation of military pay would be obviated.

It is apparent that the federal income tax withholding system[39] would apply to federally collected state taxes, and that significant efficiencies, including accelerated withholding, could occur. A piggybacked withholding system would solve the resident state's difficulty in obtaining withholding by out-of-state employers. Coordination—or the lack of it—between states that have elected federal collection and administration and states that have not, is a major stumbling block in the road to the advertised benefits of piggybacking.

The federal legislation introduces new or discredited concepts rather than adopting concepts heavily utilized by the states, creating further difficulties in coordination. Such concepts include the federal choice of a residency definition and the federal choice of apportionment of investment income between states rather than specific allocation to one or the other state.[40]

Thus it is clear that the Federal-State Tax Collection Act of 1972 cannot be expected, at least in its present form, to play a significant role in promoting uniformity of state income taxation systems, or in avoiding taxpayer risks of multiple state income taxation, or finally in closing gaps in application of state income taxes to income earned out of state by residents.[41]

How can a state of domicile or residence efficiently and effectively collect state income tax owed by a peripatetic or nomadic servicemember? The key is the common employer of that taxpayer group. If the employer withheld state taxes from its payroll and remitted collected funds to the state, the tax collected on military pay alone would yield the major amount due and would facilitate collection of taxes due on other forms of income received by the taxpayer.

The rationale for this is as follows: First, the military pay of a servicemember is not taxable by the state where he or she is stationed, but only by the state where he or she legally resides or is domiciled. Of course, if the taxpayer is also a legal resident or domiciliary of the state where he or she is stationed, his or her in-

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[39] I.R.C. §§ 3401–3404 (1976).
[40] Treas. Reg. § 301.6362-5(d)(2) (1978).
[41] Shannon, *State Income Taxes—Living With Complexity*, 30 Nat'l Tax J. 339, 340 (1977).

come may be taxed by that state. Second, servicemembers are frequently and regularly transferred to other states. Because of these two facts, the problem of collection has inevitably been seen as consisting primarily of application of a resident state's tax law to income earned out of state. Withholding by employers, after a somewhat shaky start in the early part of the century,[42] became by mid-century the principal technique for collection of state taxes on wages of employees working within the state.[43]

The game of applying withholding requirements to out-of-state employers would not be worth the candle if the state where the work was performed levied an income tax of equal or near equal proportions and the state of residence offered a credit for taxes paid to nonresident states. However, if the work was performed in a state that did not levy a tax against nonresidents, the domiciliary state's effort to obtain withholding could be worthwhile. In the case of servicemembers, the state of duty station is prohibited from levying a nonresident income tax,[44] and therefore the domiciliary state or state of residence could achieve a very significant worldwide collection by imposing withholding on a single employer.

It was in this context that a resolution on withholding of taxes was passed in June 1974 at the 42d Annual Meeting of the National Association of Tax Administrators. In this resolution it was proposed that the federal government withhold state income taxes from its military employees' pay. A similar view was expressed in the September 1975 report of the U.S. Advisory Commission on Intergovernmental Relations, entitled, "Differential State and Local Taxation of Military Personnel: An Intergovernmental Problem." This view was repeated in that agency's July 1976 report entitled, "State Taxation of Military Income and Store Sales."

The existing federal-state coordination in the form of exchange of income tax return information and joint audit agreements provided a mechanism affording some control over individual taxpayers and created a data base for determination of the amount of uncollected revenue. However, this system did not create an institutionalized structure for making collections from a large and widely scattered

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[42] A. Comstock, State Taxation of Personal Incomes 197-201 (AMS ed. 1969).
[43] C. Penniman & W. Heller, State Income Tax Administration 198-212 (1959).
[44] 50 U.S.C. App. § 574(1) (1970). This is § 514 of the Soldiers' and Sailors' Civil Relief Act, as enacted in 1940.

but homogenous group of taxpayers. Those servicemembers who had been identified by the state enforcement agency owed either an annual lump sum or else estimated-tax partial payments. Both alternatives were more burdensome than regular monthly withholding, which was conceived as benefitting both the servicemember[45] and the state fisc. Withholding was supported by both the 1975 Report to the Congress by the Comptroller General of the United States, entitled "A Case for Providing Pay-As-You-Go Privileges to Military Personnel for State Income Taxes," and the letter of August 12, 1975 of the Office of Management and Budget.

V. FEDERAL WITHHOLDING FROM CIVILIAN PAY

Withholding by the federal government in its status as an employer of civilian personnel has a substantial history. Since 1952, Congress has required the government to withhold state income taxes from the pay of civilian employees if three conditions are met: First, the state's law must generally require employer withholding. Second, that withholding must apply to the state's residents. Finally, the state must request federal government withholding. Under this old statute, still in force, withholding pertains to ". . . employees . . . who are subject to the tax and whose regular place of Federal employment is within the State. . . ." However, it does ". . . not apply to pay for service as a member of the armed forces."[46]

It is apparent from examination of the text of this statute that the territorial jurisdiction basis was preferred over the relational status basis by congress. A resident or domiciliary employee might be "subject to the tax" by reason of his relational status, but withholding will not occur unless his "regular place of Federal employment is within the State['s territory." Accordingly, the state's tax on its legal residents will be withheld only if the resident employee is working for the federal government within the state. Further, the state's tax on nonresidents will be withheld only if the nonresi-

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[45] "There is considerable support among servicemen and other concerned groups for providing withholding of State income taxes for members of the Armed Forces." H.R. Rep. No. 658, 94th Cong., 2d Sess. 294, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2897, 3190.

[46] 5 U.S.C. § 5517(a) (1976).

dent employee is working for the federal government within the state.

Executive Order No. 10407, 17 Fed. Reg. 10132 (1952), formerly reprinted as a note to 5 U.S.C. § 5517, provided:

> The term "regular place of federal employment" means the place where an employee actually performs his services, irrespective of his residence, except when such services are performed in a travel or temporary duty status, in which case his "regular place of federal employment" will be the place to which he will normally be expected to proceed for the purpose of performing further services in connection with his federal employment on the termination of travel or temporary duty status.[47]

The order defined the military exclusion by providing: "The term 'Armed Forces of the United States' includes all regular and reserve components of the Army, the Navy, the Air force, the Marine Corps, and the Coast Guard."[48] The exclusion therefore encompassed Ready Reserve and National Guard members whether on active duty or inactive duty training status.[50]

In 1956 Congress imposed a similar requirement of withholding District of Columbia income taxes from pay of civilian employees of the government who are residents of the District.[51] To this date the District income tax applies only to residents and there is no tax on nonresidents.[52] Accordingly, the "regular place of Federal employment" language achieves a congruence of the two jurisdictional bases, residence and territory, in the case of withholding for district taxes.

In 1974 Congress imposed yet another similar requirement of withholding city income taxes,[53] extended in 1977 to county income

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[47] This Executive Order was reprinted in the United States Code as recently as the 1970 edition thereof. Para. 6(d).

[48] 10 U.S.C. §§ 261(a), 270 (1976).

[50] 5 U.S.C. § 5516 (1976).

[51] A bill in Congress would extend to nonresidents the tax on income derived from sources within the district at a rate 1/3 of that applicable to residents. H.R. 10116, 95th Cong., 1st Sess. (1977).

[52] 5 U.S.C. § 5520 (1976).

taxes.[54] This legislation also did ". . . not apply to pay for service as a member of the Armed Forces." To underscore Congress' preference for the territorial jurisdiction basis, the statute requires the federal government to withhold city and county income taxes from the pay of civilian employees under the following conditions: First, the same as for state tax withholding, the city or county ordinance must require employer withholding generally. Second, that ordinance must apply withholding generally, not to residents of the city or county but rather to employees who (1) earn compensation within the city or county, and (2) whose regular place of employment is within the city or county. Third, the city or county must affirmatively request federal government withholding.

Withholding pertains to ". . . employees . . . who are subject to the tax and whose regular place of Federal employment is within the jurisdiction of the city or county . . . ." However, this applies only if the employee is a ". . . resident of the State in which that city or county is located. . . ." It is apparent that the territorial jurisdiction basis was preferred because residence is material only to the state, and not to the taxing political subdivisions.

The dual requirement of being "subject to the tax," as well as having a "regular place of employment" within the city or county, necessarily excludes the city or county resident who commutes outside the city or county to his regular place of employment.[55] Also excluded from withholding is the pay of an employee who earns some income from services performed within the city or county, and thus is "subject to the tax," but whose regular place of employment is elsewhere. Even if his place of employment is within the city or county, if he commutes there from his residence across a state boundary there is no withholding.

Executive Order No. 11863 is identical with the earlier order in its manner of defining armed forces.[56] It is nearly identical in its

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[54] Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 408, 91 Stat. 126 at 157 (to be codified at 5 U.S.C. § 5520).

[55] A bill in Congress would repeal this exclusion and extend withholding to such a situation. H.R. 8342, 95th Cong., 1st Sess (1977). Few cities or counties subject their residents to taxation on income earned outside the city or county. *But see* Thompson v. City of Cincinnati, 2 Ohio St. 2d 292, 208 N.E. 2d 747 (1965).

[56] 40 Fed. Reg. 25431 (1975), *reprinted in* 5 U.S.C. § 5520 (1977 Supp.).

definition of "regular place of Federal employment," adding only the phrase "official duty station" to describe the place where services are actually performed.

The executive order does prevent witholding unless the city ". . . has within its political boundaries, on the date of the agreement, 500 or more persons who are regularly employed by all agencies of the Federal Government." This proviso was picked up by Congress in 1977 when it added county withholding, and it now appears in the statutory definition of a county.[57] This executive and legislative limitation is apparently designed to avoid substantial federal costs of administering a withholding system if only a relatively small number of employees and amount of tax liability would be affected.

VI. WITHHOLDING FROM MILITARY PAY

Given this legislative and administrative context for withholding from pay of civilian personnel, the Congress, considering tax reform in 1976, heard and responded to arguments for withholding from military pay. It decided to permit withholding of state and District of Columbia income taxes, but not city or county income taxes, from the pay of personnel on extended active duty. This was in contrast with reserve component members on active duty for training for a short period, who would be subject to withholding of all taxes. The technique for implementing this decision was to repeal the express exclusion of military pay in the state and District withholding statutes. Further, service in the armed forces was defined to exclude inactive duty training or short periods of active duty performed by ready reserve or national guard personnel. The effect is that persons within this reserve component group are treated for withholding purposes as if they were civilians.

Congress had a problem with regard to personnel on extended active duty because § 514 of the Soldiers' and Sailors' Civil Relief Act applies to them. This provision prohibits use of the territorial jurisdiction basis for state and district taxation. That basis was the premise for the existing withholding statutes. Congress could have amended the act by reversing the prohibition. This would have been

[57] Note 54, *supra*, § 408(a) (to be codified at § 5520(c)(2).

a choice against use of the state of domicile or residence as the basis, in favor of the state in which the duty station was located. Congress could then have permitted withholding under the existing statutes. Instead, Congress amended the withholding statutes by substituting, for service personnel only, residence within the state or district as basis, in lieu of the regular-place-of-employment language. This is schematically illustrated in Table 1, below.

Finally, congress noted that in some states withholding is not generally required of employers with respect to their employees but is, at least in part, voluntary. By reason of that fact, withholding would not be possible under 5 U.S.C. § 5517. So Congress amended the section to permit but not require the federal government to volunteer its services as a withholder of state income taxes, but not District, city or county income taxes. Unless a group of affected employees were to request this action, it seems unlikely that the government would volunteer to treat them differently than the other taxpayers of the state.

The legislative history of the recent withholding amendments is instructive. The House of Representatives tax reform bill proposed voluntary withholding of state and District income taxes from military pay. The House Ways and Means Committee seemed genuinely interested in serving the interests of service personnel as shown by the quotation following Table 1, below.

TABLE 1

Withholding by Federal Government of Income Taxes From Pay of Employees

	Taxing Entity and Basis for Witholding		
Taxpayer	1. *City or County*	2. *District of Columbia*	3. *State*
Civilian Employees, Ready Reserve and National Guard	Residence in State and Territorial Jurisdiction of City or County	Residence and Territorial Jurisdiction	Territorial Jurisdiction
Military Personnel on Extended Active Duty	No withholding	Residence	Residence

> The absence of withholding has created problems for servicemen who may not know that they are subject to State income tax and may be assessed with a large deficiency when they return from active duty. In addition, in the absence of withholding, many members of the Armed Services have difficulty making the lump sum payments required when complying with the State tax on an annual basis.
>
> The bill . . . provides for such withholding in cases where the members request it.
>
> [T]his withholding is a burden which the United States should assume, both for the States and for the military and their families.

The Senate took a more strident view, amending the bill to make it mandatory. The Senate Finance Committee repeatedly noted that ". . . compliance with State income tax [obligations] by military personnel is not good."[59] The conference agreement followed the Senate's approach. In 1977 the House of Representatives Tax Reduction Bill contained no withholding provision, the Senate introduced county tax withholding, and the conference agreement accepted that addition.[60]

The state tax collectors reacted quickly to the Tax Reform Act. By the end of 1976 eight states were processing requests for withholding.[61] By the end of May 1977, thirty-six states had requested withholding.[62] By mid-March 1977, the Iowa legislature had removed the exemption of military pay,[63] thus indicating that the exemption had been grounded more on administrative difficulty in collection than a desire to show preference for this occupational group.

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[58] H.R. Rep. No. 658, 94th Cong., 2d Sess. 294–296, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2897, 3190–3192.
[59] S. Rep. No. 938, Part I, 94th Cong., 2d Sess. 379, *reprinted in* [1976] U.S. Code Cong. & Ad. News 3808–3809.
[60] H.R. Conf. Rep. No. 263, 95th Cong., 1st Sess. 34, *reprinted in* [1977] U.S. Code Cong. & Ad. News 865.
[61] The Army Lawyer, Jan. 1977, at 12–13.
[62] Gagermeier, *Withholding of State Income Tax From Active Duty Military Members*, The Army Lawyer, June 1977, at 1–3.
[63] *See* note 24, *supra*; Senate File 61, 1977 Iowa Legis. Serv. 8.

Nor was the United States Treasury dilatory in proposing [64] and adopting[65] interpretative and implementing regulations. These regulations anticipate uniform withholding agreements, as required by Executive Order No. 11997,[66] with respect to the District of Columbia, states, counties and cities. The regulations define members of the Armed Forces as:

> . . . all individuals in active duty status (as defined in 10 U.S.C. § 101(22)) in regular and reserve components of the Army, Navy, Air Force, Marine Corps and Coast Guard, except members of the National Guard while participating in exercises or performing duty under 32 U.S.C. §502, and members of the Ready Reserve while participating in scheduled drills or training periods or serving on active duty for training under 10 U.S.C. § 270(a).[67]

In accordance with that definition, the "citizen soldiers" are not treated as members of the Armed Forces and are grouped with civilian employees throughout the regulations. As to both citizen soldiers and civilian employees, the regulation defines "regular place of Federal employment" to mean, ". . . the official duty station, or other place, where an employee actually and normally (i.e., other than in a travel or temporary duty status) performs services, irrespective of residence."[68] There is no attempt to define "legal residence" or "residence" for state or local tax purposes, since those are state-law concepts pertaining to the power to levy a tax.

As noted earlier, it is conceivable that two taxing entities might legitimately assert resident status and thus jurisdiction to tax a particular taxpayer. Even more claims might unjustifiably be made. Notwithstanding multiple claims of tax liability, the executive order[69] and regulations[70] make clear that withholding will apply

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[64] 42 Fed. Reg. 22,174 (1977).
[65] 42 Fed. Reg. 33,731 (1977) (codified at 31 C.F.R. § 215 (1977)).
[66] 42 Fed. Reg. 31, 759 (1977).
[67] 42 Fed. Reg. 33,732 (1977) (codified at 31 C.F.R. § 215.2(i) (1977)).
[68] 42 Fed. Reg. 33,733 (1977) (codified at 31 C.F.R. § 215.2(k) (1977)).

[69] "[T]he head of an agency may rely on the certificate of legal residence of a member of the Armed Forces in determining his or her residence for tax withholding purposes." 42 Fed. Reg. 31,759, § 2 (1977).

[70] "[T]he head of an agency at all times may rely on the agency's current records,

only for the benefit of one state. The servicemember has it within his or her power to determine which among competing tax entities will receive his withheld taxes. He may select a state for legal residence which has no income tax, has a generous exemption, or has less than comprehensive withholding requirements, and thereby avoid withholding.

A servicemember who has not completed a certificate of legal residence will be treated as if he were claiming residence in the state listed on his first leave and earnings statements prepared after his entry on active duty. Withholding will follow or not follow as a matter of course. If that state is actually not his place of residence, or if he wishes to change his residence to another state,[71] he may complete a certificate of legal residence and the corresponding federal form W-4 (employee withholding exemption certificate). The taxing authorities in both the previously listed state and the newly listed state will be notified.[72] If a dispute occurs as to residence and jurisdiction to tax, that dispute exists between the servicemember and the state or states involved.[73] The military department cannot be

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which may include a certificate of legal residence." 42 Fed. Reg. 33,733 (1977) (codified at 31 C.F.R. § 215.10(a) (1977)).

[71] Declarations of current domicile or resident status must be consistent with legal rules such as (1) physical presence within a state, even if only for a short time, before being able to shift domicile to that state, or (2) having a permanent place of abode in the state to establish a shift in residency. In any event, tax considerations should constitute only one of several significant factors in a servicemember's decision to shift or to declare domicile or residency. *See* note 76, *infra*. But tax considerations should be explored knowledgeably.

Those states without any personal income tax are Florida, Nevada, South Dakota, Texas, Washington and Wyoming. Connecticut has a capital gains tax. New Hampshire has a commuter net income tax. New Jersey has that plus a personal gross income tax. Tennessee taxes dividends and interest. All the other states and the District of Columbia have broad-based personal income taxes. In 1976 the states collected $21.4 billion in personal income taxes, up 14 percent from the previous year. Information such as this can be found in the all-states tax guides published by Commerce Clearing House or Prentice-Hall.

[72] 42 Fed. Reg. 33,733 (1977) (codified at 31 C.F.R. § 215.10(b) (1977)). Forms W-2 are mailed to a listed state even though it does not qualify for withholding or does not levy a tax. A data base from which to evaluate uncollected or untapped revenue sources is created.

[73] In Pub. L. No. 91-569, 84 Stat. 1499 (1970), Congress gave relief to interstate railroad, motor vehicle, water and air carrier employers by prohibiting application of state and local income tax withholding on employees' pay except in favor of the state or local government in which more than 50 percent of the employees' com-

expected to intervene, is not a stakeholder, and will not be subject to interpleader.

VII. CONCLUSION

The ". . . special problems that are involved in establishing the residence for tax purposes of military personnel"[74] are not in any way alleviated by the recent changes in the law. But they will need to be solved for more servicemembers than ever before. Finance office and judge advocate legal assistance office personnel now play and will continue to play a very important role in achieving taxpayer compliance, while protecting the servicemember from improper claims.

The House Ways and Means Committee and Senate Finance Committee see an educational role:

> The committee expects that the Department of Defense will contribute to the effective implementation of this provision by making a greater effort to instruct members of the Armed Forces in their possible liability for State income taxes and the advantages of withholding in cases where they are liable for such tax.[75]

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pensation was earned. If the locations where one employee performed services were so diverse that in no single taxing entity was more than 50 percent earned, then withholding could be required only in favor of the state or local government of the employee's residence. Tax information is sent to both taxing entities.

The Senate had unsuccessfully sought to limit the power to tax, as well as the power to require withholding. The Senate Commerce Committee warned, in words now applicable to military personnel:

> [E]limination of multiple withholding was only a partial answer and, in fact, could place the employee in greater jeopardy than he would have been had the bill not been passed. This is true because the elimination of a State's power to require withholding has no bearing on the State's power to tax.

S. Rep. No. 1261, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5039, 5041.

[74] S. Rep. No. 938, 94th Cong., 2d Sess. 380, *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 3809.

[75] H.R. Rep. No. 658 at 295, S. Rep. No. 938, Part I, at 380, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 2897 at 3192, 3439, and 3810. The House version had "you" in place of "the" at the beginning of the sentence. The Senate version had "requirements" in place of "advantages."

It is difficult to imagine how that instruction "in cases where they are liable for such tax" could be anything other than individualized, personal and confidential.

Superficially, it would seem that understanding and compliance should not be made more difficult simply because the servicemember moves from one duty station to another, because his domiciliary or residence status remains the same unless affirmative steps are taken to change it. As a practical matter, however, compliance is more difficult because of repeated moves, notwithstanding § 514 of the Soldiers' and Sailors' Civil Relief Act, since most servicemembers have income in addition to military pay. Further, their spouses often have nonmilitary income.

When some income is arguably taxable by the state and local taxing entities where the servicemember is located, and taxable also by the entity of residence subject to a credit for taxes paid where the member is located, and when military pay is arguably taxable by the state of domicile or residence, the result is a spate of questions and a paucity of definitive answers. A perception of what others are doing or not doing in seemingly similar situations, the portent of multiple taxation of the same unit of income, and the more common taxation by several entities of different units of income, exacerbate the member's frustration, confusion and uncertainty. The finance officer or military lawyer who can sort out and solve these problems performs a real service.

The occasion for seeking a solution may be uncomfortable, since withholding or the lack of it does not affect the taxpayer's basic tax liability, but rather is only a means of rateable prepayment during the tax year. Nor does it affect the duty to file a tax return. As is true under the Internal Revenue Code, most state laws contain no statute of limitations on civil law liabilities if a return was not filed. A number of years of putative liability puts the servicemember in a poor bargaining position. But "letting a sleeping dog lie" will only add to those years and possibly add a criminal charge for evasion or failure to file a return.

There is simply no good alternative to a bold course of accurately identifying current domicile or residence[76] and conforming military

[76] A close study should be made of Borgen, *The Determination of Domicile*, 65 Mil. L. Rev. 133 (1974), and Sanftner, *The Serviceman's Legal Residence: Some Practical Suggestions*, 26 JAG J. 87 (1971).

records accordingly. This presumably will trigger withholding if the state of current domicile or residence is covered by the new legislation. If this happens, the member must file returns there on military and nonmilitary income, and also file returns with nonresident tax entities where the nonmilitary income was earned, as appropriate. Finally, the member should bravely negotiate with all other taxing entities.

An optimistic outlook would posit that most taxing entities are more interested in current and future compliance with their tax laws, than in disputing possible liabilities during prewithholding years. A state claiming to be a state of domicile or residence has the power to commence a collection suit in the courts of a sister state. This is so, notwithstanding a widely discredited view that one state should not enforce the revenue laws of another state. However, there has been little activity by state revenue departments suing out-of-state individual taxpayers, either because of reciprocal tax collection statutes in both states or because of a new view of comity. The major thrust has been against out-of-state corporate taxpayers.

It may be expected that successful negotiation will not yield an agreement about residence, but rather a lack of enforcement activity and ultimate estoppel in favor of the taxpayer. Such a result should be carefully explained to the servicemember so that he is reasonably reassured, and that his compliance with the tax law of his declared state of domicile or residence is supported.

POSSIBLE CONSTITUTIONAL LIMITATIONS ON CONGRESSIONAL AUTHORITY TO REDUCE MILITARY PAY RETROACTIVELY*

by Captain Stephen D. Petersen**

In this article, Captain Petersen discusses the Supreme Court's 1977 Larionoff decision and its implications. In that case, the Court decided that the Navy could not deny variable reenlistment bonuses to certain sailors who were eligible for the bonuses when they reenlisted but who became ineligible because of changes in applicable regulations.

Captain Petersen examines in particular the question whether the Court based its decision on a theory of improperly retroactive legislation, unconstitutional under the Due Process Clause of the fifth amendment. He argues that the Court probably did not do so; that, instead, the Court was merely concluding that Congress could not reasonably have intended a result seen by the Court to be highly unfair to the servicemembers involved.

I. INTRODUCTION

On June 13, 1977, the Supreme Court decided the case of *United States v. Larionoff*.[1] The issues presented were common enough: (1)

*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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1. 431 U.S. 864.

whether the military had correctrly construed its own regulations, and if so, (2) whether those regulations as applied were consistent with the underlying statute, and if so (3) whether the underlying statute as applied was constitutional. The Court's holding was less than inspirational from a philosophical standpoint: the regulations were inconsistent with and hence not authorized by the statute. On its face, this holding hardly appears to be invested with constitutional undertones. Yet despite this facial preoccupation with the extent of authority delegated to the military by Congress, the Court's decision says more about the extent of authority conferred upon Congress by the Constitution.

In order to explore this apparent paradox, it will be fruitful to first examine the facial rationale of the *Larionof* five-Justice majority.

II. THE RATIONALE OF *LARIONOFF*

The focal point of the *Larionoff* case was the so-called "variable reenlistment bonus,"[2] a special type of reenlistment bonus designed to attract servicemembers whose military skills were in short supply. The VRB was to be a multiple, up to four times, of the amount of the historical and more familiar "regular reenlistment bonus."[3]

Two categories of named plaintiffs were involved in the *Larionoff* case. The first category was typified by Larionoff himself. The Court described Larionoff's situation this way:

> This [VRB] program was in effect when respondent Nicholas J. Larionoff enlisted in the Navy for four years on June 23, 1969. Shortly after his enlistment, Larionoff chose to participate in a Navy training program, completion of which would qualify him for the service rating 'Communications Technician—Maintenance' (CTM). At that time, as Larionoff was aware, the CTM rating was classified by Navy regulations as a 'critical military skill,' whose holders were eligible upon reenlistment or extension of enlistment for payment of a VRB in the amount of

2. Hereinafter referred to in text and notes as VRB.
3. Hereinafter referred to in text and notes as RRB.

> four times the RRB, the highest allowable rate. Before entering the training program which entailed a six-year service obligation, Larionoff entered a written agreement to extend his enlistment 'in consideration of the pay, allowances, and benefits which will accure to me during the continuance of my service.' Larionoff successfully completed the program and was advanced to the CTM rating, expecting to receive a VRB upon entering the period of his extended enlistment on June 23, 1973.
>
> On March 24, 1972, however, the Navy announced that effective July 1, 1972, the CTM rating would no longer be considered a 'critical military skill' eligible for a VRB. When Larionoff, through his congressional representatives, inquired into his continued eligibility for a VRB, he was informed that since the CTM rating was no longer listed, he would not receive the expected bonus. Accordingly, in March 1972, respondents filed this lawsuit, and in September of that year the District Court certified a class and granted summary judgment for respondents, ordering payment of the disputed VRB's. (Footnotes omitted.)[4]

The second category was typified by Plaintiff Johnnie S. Johnson. Like Larionoff, Johnson had enlisted in the Navy at a time when the VRB program was in effect and his CTM rating[5] was classified as a critical military skill. Unlike Larionoff however, before Johnson began serving his extended enlistment period, Congress repealed the old VRB system, and substituted a new "selective reenlistment bonus"[6] system. The nature of the new SRB system is not further relevant to this discussion, except to note that Johnson was not eligible for it.

The Court defined the two questions presented by the two categories of plaintiffs as: (1) whether Larionoff and those in his position were entitled to receive VRB's despite the Navy's elimination of their rating from the eligible list in the period after their agreement to extend their enlistments but before they began serv-

4. 431 U.S. at 866–68.
5. A naval rating is analogous with military occupational specialty, or MOS, in the Army.
6. Hereinafter referred to in text and notes as SRB.

ing those extensions; and (2) whether Johnson and others in his situation were entitled to receive VRB's despite the repeal of the VRB program in the same period.

The Court first held in favor of the Larionoff category, finding that:

> insofar as they required that the amount of the VRB to be awarded to a service member who extended his enlistment was to be determined by reference to the award level in effect at the time he began to serve the extension, rather than at the time he agreed to it, the relevant regulations were contrary to the manifest purposes of Congress in enacting the VRB program, and hence invalid." (Footnotes omitted.)[7]

The Court's thinking concerning the *Larionoff* category was logical enough: if the goal is reenlistment incentive, the incentive should be placed at the time the decision to reenlist is made, i.e., at the time the servicemember agreed to the reenlistment or extension of service. The regulations adopted by the Navy did not, in the Court's view, provide sufficient assurance that the VRB would be paid so as to accomplish the "decision-point-incentive" scheme that it thought Congress had in mind.

The Johnson category, on the other hand, presented a more difficult problem for the Court. By ruling as it did in favor of Larionoff, the Court was bound to conclude, as it did, that Johnson's pay claim had ripened into an "entitlement", or in other words had "vested".[8]

Thus, the Court was confronted, as it recognized, with two remaining questions: whether Congress, by its repeal of the VRB program in 1974, intended to divest servicemembers like Johnson of

7. 431 U.S. at 877.

8. The proiper definition of a "vested" right to pay is elusive, and may vary from situation to situation. For purposes of this article, the author has subscribed to the definition employed by the Supreme Court in *Larionoff*, "pay due for services already performed, but still owing." 431 U.S. at 879. This definition has the advantage of being simple and practical, though there may be other acceptable definitions. Although an argument to the contrary could be made, the *Larionoff* majority assumed that such a "vested" right was at issue, and consequently the author assumes it also.

their accrued VRB, and if so, whether such a repeal was constitutional.

Surprisingly, the Court avoided passing on the constitutional question by holding that Congress had not intended to divest VRB rights from those servicemembers who were otherwise entitled. The reason for the surprise was not that the Court had favored one construction of a statute over another to save the statute's constitutionality, or even that in so doing the construction was strained.[9] The surprising thing was that the construction given the statute by the Court appeared to be directly contrary to the express intention of Congress, and demonstrably so.

It seemed apparent from the legislative history of the VRB repeal that servicemembers in Johnson's situation were considered by the conference committee, and it was determined that payment of the VRB to these members would not serve the legislative goals of the bill. The conference committee made clear that these members should be eligible for the $15,000 (maximum) SRB, provided the members obligated for two additional years. If the members did not wish to trade the extra time for extra money, they would have to content themselves with only the RRB in addition to their accelerated ratings.

The conference committee reported as follows:

> The House Committee in reporting the bill indicated its intention that bonuses not be authorized for personnel for existing obligated service. There was brought to the attention of the conferees[10] a problem that would exist, particularly in the Navy nuclear-power field, under the House interpretation of the language of the bill, in cases where commitment has been made to a man with a four-year enlistment and a two-year extension that he can can-

[9] *See, e.g.*, Train v. Natural Resources Defense Council, 412 U.S. 60, 75, 87 (1975).

[10] It was widely rumored that Admiral Rickover, the "father of the nuclear Navy," first discerned the problem that would arise with servicemembers like Johnson, and that the admiral had sufficient political sway to lobby in their behalf. Apparently his efforts succeeded to the degree indicated in the quoted conference committee report in assuaging the problem that previously had been overlooked by both military and legislative staffers.

> cel the two-year extension and reenlist for four years and receive a reenlistment bonus for the four-year reenlistment. The Navy expressed great concern that the language of the bill might be interpreted to require it to abrogate an understanding it had with enlistees and would operate in such a way as to cause serious retention problems in its most critical career field. The conferees, therefore, want it understood that while it normally does not expect bonuses to be paid for services for which there was an existing obligation, it is consistent with the conferees' understanding that full entitlement to SRB will be authorized for personnel who have already agreed to an extension period if they subsequently cancel this extension prior to its becoming operative and reenlist for a period of at least two years beyond the period of the canceled extension.[11]

Apart from this plain legislative history, there were two aspects to the new 1974 Act which suggested that Congress intended nothing of the sort the Court said it did. First, the new statute contained a savings clause preserving the right of existing active duty servicemembers to receive an RRB but omitted a similar savings provision for the VRB.[12]

Second, and this point involves the fine interfaces and interstices of the federal budget, if Congress intended that the Johnson cate-

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[11] [1974] U.S. Code Cong. & Ad. News 1044. The Court dealt lamely with the conference committee's report by saying,

> the only relevance of the Report to the problem before us is that it demonstrates that Congress was responsive to the "concern that the language of the bill might be interpreted to require it to abrogate an understanding" between the Armed Forces and enlistees, *ibid.*, making it less rather than more likely that Congress intended the 1974 Act to abrogate Johnson's entitlement to a VRB by implication.

431 U.S. at 882. This view is, at best, the result of a truncated reading.

[12] The court pointed out,

> [T]he saving clause for RRB's does not merely preserve them for those who had already extended their enlistments, but assures RRB's upon reenlistment to any service member then on active duty. The failure to enact a similar provision as to VRB's indicates only that Congress did not intend that VRB's be paid to those servicemembers who reenlisted after the effective date of the Act, and has no bearing on those who had already extended their enlistments and became entitled to VRB's.

431 U.S. at 881.

gory be paid the VRB, where was the appropriation? The absence of an appropriation would raise serious questions of sovereign immunity,[13] as well as congressional intent.[14] The Court, relying on the slimmest of reeds, finessed this problem by footnoting, "the Government's concession that the 1974 Act does not affect respondents other than Johnson implicitly admits that the Act permits such payments,"[15] presumably because several servicemembers in the "Larionoff category" would have VRB installments falling due after the effective date of the act.

Finally, the Court's construction of the statute must have come as some surprise to the circuit judges who had heard and decided *Larionoff* and other similar cases then pending, as well as to the four dissenting justices. None of those judges or justices apparently entertained the slightest doubt about what Congress had intended.[16]

Thus we come to the ultimate question: Did the *Larionoff* majority simply misread the congressional intent, or, in view of the apparently strained construction of the state, is the majority really saying something fundamental about the constitutional issues it so strenuously sought to avoid, or is there another answer? To answer this question, an analysis of possible constitutional limitations is in order.

However, this logic is fallacious. From the fact that the RRB saving clause may have conferred entitlement upon two categories of personnel (those "who had already extended," as well as those who had yet to do so), it does not follow that by the *omission* of the savings clause for the VRB, Congress intended the *disentitlement* of only *one* of those categories (those who had yet to extend). Congress could well have had the disentitlement of both categories in mind. The Court's statement that the absence of a saving clause "has no bearing on those who had already extended their enlistments and become entitled to VRB's" simply begs the question.

[13] *Cf.*, Edelman v. Jordan, 415 U.S. 651 (1974).
[14] *See* United States v. Dickerson, 310 U.S. 554 (1940).
[15] 431 U.S. at 880 n. 23.

[16] *See* United States v. Larionoff, 431 U.S. at 882-83 (1977); Larionoff v. United States, 533 F.2d 1167 (D.C. Cir. 1976); Collins v. Rumsfield, 542 F. 2d 1109 (9th Cir. 1976); and Carini v. United States, 528 F. 2d 738 (4th Cir. 1975). Interesting, of the eighteen eminent justices and judges who made these four decisions, thirteen had no doubt that Congress intended a *dis*entitlement to the VRB. But the five-justice majority in *Larionoff* reached the construction it did in an effort to avoid certain constitutional "problems." 431 U.S. at 879.

III. THE POTENTIAL CONSTITUTIONAL SOURCES OF LIMITATION

In terms of absolutes, nothing in the Constitution confers upon the Judiciary any raw or absolute power to compel Congress to appropriate funds for anything. The Constitution confers the so-called "spending power" on Congress,[17] not on the courts. Though it may be forcefully argued that Congress is under a constitutional mandate to provide financing for its coequal constitutional institutions: the judiciary and the Presidency,[18] such a case has not arisen and is quite unlikely to. Those cases which have arisen have done so overwhelmingly in the area of congressional *authority* to spend rather than congressional *duty*, in the first instance.

However, once Congress has undertaken a governmental function, or indeed even merely to spend, there are numerous constitutional restrictions which limit not only the means by which the function is accomplished, but also the ability of Congress to reduce the spending. Thus, Congress may not provide for imprisonment without first appropriating monies for the means by which to determine guilt in accordance with the Constitution;[19] once established, the salaries of Article III judges may not be reduced;[20] reduction or termination of government benefits must not be based on classifications that are invidiously discriminatory;[21] and so forth.

As suggested, the potentital sources of such constitutional limitations are, in the abstract, fairly numerous. However, the potential sources of restriction on military pay reductions are more limited, and easily named, through it is readily apparent that only one could possibly apply to the *Larionoff* statute. For example, Public Law No. 93-277 is clearly not a bill of attainder, since it is not an infliction of legislative punishment without a judicial trial.[22]

The statute cannot be attacked as an *ex post facto* law because it is civil and not penal.[23]

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[17] U.S. Const. art. I, §8, cl. 1.
[18] *See, e.g.*, Embry v. United States, 100 U.S. 680, 680 (1879) (dictum).
[19] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).
[20] O'Donoghue v. United States, 289 U.S. 516 (1933).
[21] *Cf.* Loving v. Virginia, 388 U.S. 1 (1967).
[22] *Compare* United States v. Lovett, 328 U.S. 303 (1946).
[23] Kentucky Union Oil Co. v. Kentucky, 219 U.S. 140 (1911); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

The staute cannot be attacked under the impairment of contract clause because that clause by its own terms applies only to the states. A contention that a party has a contract with the United States which the United States has impaired does not necessarily state a cause of action because statutory interference with an existing contract *qua* contract is not as such prohibited by the Constitution.[24]

Plainly, it was not these constitutional limitations to which the *Larionoff* majority referred. While the majority's opinion does not explain the constitutional source of their concern, the citation of *Lynch*[25] and *Perry*[26] make the source apparent. It is that notion, reposed in the Due Process Clause, known as the "retroactive legislation" limitation, which created the constitutional problem.

Does this then mean that Congress is in terrible constitutional trouble should it ever again undertake to reduce vested rights to military pay? The answer is "maybe, but not necessarily". Despite certain implications in the decision which suggest that the underpinnings of the holding were constitutional rather than statutory, the Court left obvious constitutional avenues open for Congress to accomplish pay reductions. The distinguishing functional feature to these alternative avenues is the reason Congress assigns to the reduction requirement. The distinguishing constitutional feature to these alternative avenues is the presence of a competing constitutional interest, such as the War Powers Clause, sufficient to countervail as against the Due Process Clause.

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[24] *Cf.* F.H.A. v. The Darlington, Inc., 358 U.S. 84, 89–91 (1958); Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).

It is interesting to note that there is one specific constitutional provision which seemingly would require Congress or the military services to refuse to pay otherwise accrued and payable pay and allowances to a servicemember. This prohibition applies to any period during which the servicemember aided any "insurrection or rebellion against the United States." It is applicable even without an adjudged court-martial sentence of forfeiture.

> [N]either the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

U.S. Const. amend. XIV, §4.

[25] Lynch v. United States, 292 U.S. 571 (1934).
[26] Perry v. United States, 294 U.S. 330 (1935).
[27] 431 U.S. at 880.

Buried in the majority's decision is one important, lone sentence which will allow *Larionoff* to be distinguished (as appropriate) in future cases:

> No paramount power of the Congress or important national interest justifying interference with contractual entitlements is invoked [in the language of the Amendment or its legislative history].

The most obvious "paramount power of the Congress" which could be invoked in such a case is of course the War Powers Clause.[28] Clearly, the majority is suggesting that a proper invocation of the war powers may well prevail in a future conflict with the retroactive legislation limitation. There is ample historical support for this suggestion. But before turning to this support, these competing constitutional provisions should be placed in context.

IV. THE NATURE OF THE RETROACTIVE LEGISLATION LIMITATION

Most Supreme Court decisions on the subject of the "retroactive legislation" limitation do not use that term as such, but rather refer to a deprivation of property without due process of law.[29] Earlier Supreme Court decisions in the area, as in other constitutional subject matter areas involving congressional power, tended to analyze the problem in terms of the extent of the constitutional authority granted, *ab initio*, rather than as a limitation on authority otherwise conferred.[30] Of course the problem could also be one of a taking

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[28] Apart from its mention of a "paramount" congressional power, the more interesting though perhaps ethereal aspect of that important sentence in the Court's *Larionoff* opinion is the indication that an "important national interest" may be sufficient to override the retroactive legislation limitation. This view of the Court is apparently unsupported by any separation-of-powers considerations, such as the war powers. Just what might constitute an "important national interest" is open to conjecture. Equally interesting is the question whether a mere congressional incantation of an important national interest would trigger the override, without an independent judicial assessment.

[29] *See, e.g.*, Flemming v. Nestor, 363 U.S. 603 (1960); Perry v. United States, 294 U.S. 330 (1935); Lynch v. United States, 292 U.S. 571 (1934); and Noble v. Union River Logging Railroad, 147 U.S. 165 (1893).

[30] *See, e.g.*, Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).

without just compensation, and this is sometimes mentioned.[31] But the ultimate question seems to be articulated as one of substantive due process, perhaps because of the expanded possibilities of remedies thereunder, as opposed to a taking, even though in contract cases the taking theory has some measure of facial attractiveness.[32]

The *Lynch* case is the leading Supreme Court decision in the area. In it the Court held unconstitutional a statute abrogating outstanding contracts for war risk insurance. The *Lynch* opinion emphasized that the insurance contracts there in question had in fact been repudiated, and that the repudiation abrogated "vested" rights.[33] The *Lynch* Court also emphasized that *gratuitous* benefits may be redistributed or withdrawn at any time in the discretion of Congress (e.g., health care, disability and retired pay). On this point of distinction, *Larionoff* holds by rather clear implication that military pay may be the subject of a vested right.[34]

There is a second important aspect to the *Lynch* opinion. It was conceded that "economy" was the sole motive behind the repudiation of the insurance contract.[35] And having noted this fact, Justice Brandeis (writing for the Court) carefully pointed out:

> [The contracts may not be annulled] unless, indeed, the action taken falls within the federal police power or some other paramount power.
>
> The Solicitor General does not suggest either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power. (Footnotes omitted)[36]

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[31] *See* Lynch v. United States, 292 U.S. 571, 579 (1934).
[32] *Id.*
[33] *Id.*, at 577.

[34] Modern cases have tended to deemphasize wooden distinctions between "gratuities" and "vested rights" as not "profitable." Flemming v. Nestor, 363 U.S. 603, 610 (1960). Such a tendency allows the Court more latitude in applying a balance of the equities. *Id.* (In the *Flemming* case, social security benefits were found not to be an "accrued property right" within the meaning of the due process clause.)

[35] 292 U.S. at 579–80.
[36] *Id.*

Thus, Justice Brandeis was saying that the retroactive legislation limitation was not an absolute one, but rather could be outweighed on the constitutional scales by a proper exercise of other constitutional powers of the Congress, the most obvious being the war powers.

V. THE NATURE OF THE WAR POWERS CLAUSE AND ITS RELATION TO MILITARY PAY

The Constitution empowers Congress to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces.[37] Therefore, as between the three branches of the government, Congress has exclusive power to provide for compensation of military personnel.[38]

The war powers not only are explicit in the Constitution, but such powers are also inherent incidents of sovereignty, and even "if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."[39]

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[37] The several war powers are found at U.S. Const. art. I, §8, cl. 11, 12, 13, and 14.

[38] *See* Bell v. United States, 366 U.S. 393, 401 (1961); Rodgers v. United States, 185 U.S. 83 (1902); Ward v. United States, 158 F. 2d 499 (8th Cir. 1946).

[39] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936). *See also* Lichter v. United States, 334 U.S. 742 (1948).

While it is true that, at present, the Nation is not engaged in a shooting war, the Supreme Court has not adopted a construction of the war powers clause which hobbles Congress "when the guns are silent but the peace of Peace has not come." Ludecke v. Watkins, 355 U.S. 160, 170 (1948). (In the *Ludecke* case, the Court found that the power conferred by Congress upon the President to deport enemy aliens did not lapse when the shooting of World War II stopped.) The war power "is not limited to victories in the field. . . . [I]t carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1871). (In the *Stewart* case, the Court sustained a Congressional deduction of a tolling period from a statute of limitations.)

Justice Story commented,

> [I]t is important also to consider that the surest means of avoiding war is to be prepared for it in peace . . . . How could a readiness for war in time of peace be safely prohibited, unless we could in like manner prohibit the preparations and establishments of every hostile nation? . . [I]t will be in vain to oppose constitutional barriers to the impulse of self-preservation.

3 J. Story, Commentaries on the Constitution of the United States §1180 (1833).

Plainly, such power necessarily includes the authority to remunerate the armed forces. Congress has an inherent, plenary and exclusive power to determine the age at which a soldier or seaman shall be received, the compensation he shall be allowed and the service to which he shall be assigned.[40]

Indeed, through the power of conscription, Congress has the power to require military service without *any* pay. This is so because military service, when required, is one of those duties owned to the Nation.[41] In fact, Congress has had occasion in the past to lower military pay and allowances without affecting obligated military service.[42]

During the Civil War, faced with the problem of making payment to the Union troops in the field and other financing problems, Congress authorized the issuance of treasury notes which, although not redeemable in species, were made legal tender in payment of private debts. The Supreme Court upheld the so-called "Legal Tender Acts" as against the argument that the acts were unconstitutional as applied to contracts made prior to passage.[43]

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[40] S. Doc. No. 92-82, *The Constitution of the United States of America–Analysis and Interpretation*, 92d Cong. 331 (1973). *Cf.* United States v. Williams, 302 U.S. 46 (1937), in which the Court found that parents' right to the services of minor sons is superseded by the war powers provisions.

[41] Butler v. Perry, 240 U.S 328, 333 (1916) (dicta). *See also* Selective Draft Law Cases, 245 U.S. 366 (1918).

[42] For examples, *see* the statutes effecting pay reductions in 1932 and 1933. *Compare* Act of June 30, 1932, Pub. L. No. 72-212, §105, 47 Stat. 401, *with* Act of March 3, 1933, Pub. L. No. 72-428, 47 Stat. 1489. *See* United States v. Dickerson, 310 U.S. 554 (1940).

[43] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).

A related type of retroactively applied congressional power was recognized in the case of reservists who, pursuant to congressional authorization enacted subsequent to the execution of the reservists' enlistment contracts, were called to active duty in derogation of the language in the reservists' enlistment contracts. They were called up for periods up to 24 months, including service in Vietnam.

The reservists' claim that this action violated their contracts and their fifth amendment rights was uniformly rejected by the courts. *E.g.*, Morse v. Boswell, 289 F. Supp. 812 (D.Md. 1968), *aff'd* 401 F.2d 544 (4th Cir. 1968), *cert. den.* 393 U.S. 1052 (1969); Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971); Schwartz v. Franklin, 412 F.2d 736, 738 (9th Cir. 1969); Johnson v. Powell, 414 F.2d 1060 (5th Cir. 1969).

It is not surprising then that the Supreme Court, followed by the lower courts, has stridently asserted this authority and power of Congress in the area of military pay. Any right to receive military pay is dependent upon statutory entitlement and is not contractual.[44] The Supreme Court's decision in the *Bell* case[45] is instructive on this point. The case involved certain enlisted men who were captured during the Korean hostilities in 1950 and 1951. While prisoners of war they defected and after the Korean armistice in the summer of 1953 refused repatriation and went to Communist China.

In the *Schwartz* case, the Ninth Circuit said, "Congressional war powers permit at least the minimal breach of Schwartz's enlistment contract or infringement of his personal freedom which might possibly result from the retroactive application of 10 U.S.C. §673(a)." 412 F.2d at 738. If the war powers provisions authorize such retroactive active duty for a reservist, it seems that military pay measures must also be subject to retroactive adjustment, *a fortiori*.

[44] Bell v. United States, 366 U.S. 393, 401 (1961); Goodley v. United States, 441 F.2d 1175 (Ct. Cl. 1971); Andrews v. United States, 175 Ct. Cl. 561 (1966); Akerson v. United States, 175 Ct. Cl. 551 (1966). *Goodley*, *Andrews*, and *Akerson* all concerned retirement pay.

Although it is often stated that a military enlistment is a contract, it is indeed of a peculiar type. Enlistment is the act of one who voluntarily enters the military or naval service of the government, contracting to serve in a subordinate capacity. Morrissey v. Perry, 137 U.S. 157 (1890). Enlistment is a contract, and it is one of those contracts which change the status of the promissor. United States v. Grimley, 137 U.S. 147 (1890). The change in status from civilian to soldier is effective until the promissor is released from active duty. Wallace v. Chafee, 451 F.2d 1374, 1378 (9th Cir. 1971); Borschowa v. Claytor, 568 F.2d 617 (9th Cir. 1977).

As federal contracts, military enlistment contracts are governed by federal law. Rehart v. Clarke, 448 F.2d 170, 174 n. 2 (9th Cir. 1971). *Cf.* United States v. Standard Oil Co., 332 U.S. 301 (1947). Cases involving federal contracts are determined in accordance with general contract law, unless Congress has fashioned a rule of substantive law in the area. Colden v. Asmus, 322 F. Supp. 1163 (S.D. Calif. 1971). *Cf.* United States v. Standard Oil Co., 332 U.S. 301 (1947).

Existing laws automatically become a part of enlistment contracts and are read into those contracts in order to fix the rights and obligations of the parties. This includes regulations which have the force and effect of law. Rehart v. Clarke, 448 F.2d 170, 173 (9th Cir. 1971). However, it is manifest that:

> not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.

Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 435 (1934). *See also* City of El Paso v. Simmons, 379 U.S. 497 (1965); Bell v. United States, 366 U.S. 393, 401 (1961).

[45] 366 U.S. 393 (1961).

They were dishonorably discharged from the Army in 1954. In 1955 they returned to the United States and filed claims for accrued pay and allowances which were denied administratively. They then sued in the Court of Claims for pay and allowances from the time of their capture until the date of their discharge from the Army.

One of the Army's arguments advanced in support of the administrative denial of the claim for pay was that Bell and the other claimants had violated their obligation of faithful service, and that under contract principles, "one who willfully commits a material breach of a contract can recover nothing under it."[46]

The Supreme Court rejected this argument that contract principles applied, saying:

> Preliminarily, it is to be observed that common-law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon statutory right.[47]

VI. THE RESOLUTION OF THE CONFLICT BETWEEN THE RETROACTIVE LEGISLATION LIMITATION AND THE WAR POWERS CLAUSE

It should be clear from the above cases that much more than a mere contract contest is potentially at stake in a case like *Larionoff*. Unlike *Lynch* and *Perry*, no mere breach of contract is involved.[48]

Yet, even though the statutory repeal at issue in *Larionoff* was passed pursuant to the congressional war powers, there were but two purposes mentioned in the legislative history: the need to provide a financial incentive for certain critical skill reenlistments, and the omnipresent concern for cost effectiveness, or "economy." Since Johnson's divestment was not in furtherance of the first purpose, the only purpose could be "economy." Thus the Court was quite correct that "no paramount power" or "important national interest" had been "invoked."

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[46] 366 U.S. at 401.
[47] *Id.*
[48] 366 U.S. 393 (1961).

Reading all of the cases together, it seems plain that such a proper "invocation" will override the retroactive legislation limitation. The only remaining questions are what powers or interests might qualify and, once this is determined, whether the courts will decide whether there has been such an invocation when Congress has already said so. The second question, in other words, is whether the courts will look behind a congressional declaration. "Paramount powers" obviously include any powers the review of which is limited under the separation of powers doctrine.

Little can be said of what might constitute an "important national interest" without lapsing into utter conjecture in view of the void in the case law. The only thing that can be said with certainty is that retroactive diminution of an interest may be constitutional if such a diminution was contemplated (expressly or impliedly) in the creation of that interest,[49] or if Congress has with sufficient clarity identified a paramount power or important national interest.[50]

As for whether the courts will look behind a declared congressional intention, it seems doubtful that the Supreme Court would ever test the strength of a congressional declaration of purpose. Such a review would involve too many of the practical and political problems which have caused the Court to eschew the idea in the past.

VII. CONCLUSION

Earlier, the question was posed whether the *Larionoff* majority simply erred in its reading of congressional intention, or was implicity announcing a new form of redress in the balancing of two competing constitutional provisions. The author submits that the majority was doing neither of these.

In fact, the majority *correctly* discerned the true intention of Congress. It would have been very unfair if the young servicemembers involved had been deprived of the financial fruits of

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[49] *See, e.g.*, Flemming v. Nestor, 363 U.S. 603 (1960). In this case, the Court held that defeasance of previously "accrued" social security benefits does not violate the due process provision of the fifth amendment.

[50] *See, e.g.*, the discussion at note 43, *supra*.

their extension agreements, and it seems reasonable to conclude that Congress could not have intended such a result.[51] The *Larionoff* majority was correctly influenced to this conclusion by the fact that the primary thrust of the legislative scheme was to provide a financial incentive at the re-enlistment decision-point.

Further, despite the evidence of the conference committee report, which may be ambiguous on this point, there was a conspicuous absence of any congressional recognition that it was perhaps divesting some rights previously granted, or was acting unfairly. Whether Congress as a whole ever understood all the implications of its action is open to question. But it seems likely that, had Congress come to an understanding, it would have been that attributed to it by the *Larionoff* majority.

If this analysis is correct, it leads to a further conclusion: that the *Larionoff* decision is truly to be viewed as a holding on statutory construction. This being so, the decision in no way derogates from the historical place of predominance which the War Powers Clause holds within the constitutional scheme. This conclusion is extremely important to future administrative interpretation and application of military pay statutes. But reliance on this conclusion may be had in the confidence that this is what the *Larionoff* majority said.

Thus, in summary, *Larionoff* does not alter the prior state of the law concerning possible constitutional limitations on congressional authority to reduce military pay retroactively.

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[51] This possible unfairness escaped no one. The views of Judge Haynsworth were "essential[ly]" shared by the four-justice *Larionoff* dissenting minority. He stressed that, despite the lack of *legal* merit, as he saw it, to the servicemembers' claim, "the Congress may wish to reconsider their situation and the moral claim they may have against the United States." Carini v. United States, 528 F.2d 738, 742 (4th Cir. 1975).

UNPLANNED BUT IMPERATIVE: THE ORIGINS OF THE JUDGE ADVOCATE GENERAL'S CIVIL AUTHORITY*

By Captain Michael Hoffman**

In this short article on a topic of legal history, Captain Hoffman discusses the growth of the authority of The Judge Advocate General to provide legal advice in areas other than military justice. He reviews official correspondence and other documents from 1851 to 1880.

*The article is intended to fill a gap mentioned in the bibliographic notes to the official history of the Army's Judge Advocate General's Corps.****

I. INTRODUCTION

The Judge Advocate General emerged as War Department chief counsel through a subtle process. Though there were no formal boundaries, his early span of authority was limited to issues of criminal law. The powers of his office grew without official guidance or definition. Being gradual, these changes largely escaped public notice and remained obscure in the generations that followed.

II. THE PROCESS BEGINS

When Major John Lee became Judge Advocate of the Army in 1849 he was the first to serve by legislative fiat in nearly 30 years.

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*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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***U.S. Dep't of Army, The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975, at 264.(1975).

In 1821 the last statutory provision for judge advocates had been removed from the books,[1] and in the interim officers had occasionaly been detailed to handle questions of criminal law. Since Lee's appointment, the United States has always had lawyers in uniform, and it was during his tenure that their jurisdiction expanded to civil matters.

The legislation of 1849 did not specify the responsibilities of the Judge Advocate,[2] nor was it accompanied by any committee reports which might have clarified the statute. Declaring only that a judge advocate should be appointed for the Army, the law was followed by General Order No. 18, which announced the establishment of that office with an unembellished reprint of the statute.[3] Major Lee, however, had his own, very narrow interpretation of his authority. In 1851 he was asked to untangle and explain the statutory provisions for enlistment. While he replied that it gave him "great pleasure in sending . . . unofficially such information as I have," he also felt obliged to note, "officially the Judge Advocate knows no matter of law or fact, except what relates to the penal code, and the guilt or non-guilt of some officer or soldier."[4] This is the first recorded instance of the Judge Advocate rendering an opinion on a subject other than military justice.

In early 1853 he received the second request for such advice from the Commissioner of Pensions, who wanted his opinion on questions arising "under the Land Bounty laws as affected by military usage." Could a soldier with two terms of service, one of which had ended in dishonorable discharge for desertion, total his honorable service time with a portion of the dishonorable enlistment period in order to qualify for a land bounty? If not, and the honorable enlistment was

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[1] The Act of April 4, 1818, ch. 61, sec. 2, 3 Stat. 426, authorized appointment of a judge advocate. It was superceded by the Act of March 2, 1821, ch. 13, 3 Stat. 615, which contained no such authorization.

[2] Act of March 2, 1849, ch. 83, sec. 4, 9 Stat. 351.

[3] Gen. Order No. 18, War Dep't (27 Mar. 1849).

[4] Letter from Judge Advocate John Lee to Colonel H. Brown (7 Oct. 1851), 1 Letters Sent 155. The mid-nineteenth century internal correspondence of the Judge Advocate General is collected in Records of The Office of The Judge Advocate General (War), U.S. National Archives Record Group No. 153. This correspondence is organized as Letters Sent and Letters Received, and is so cited hereafter.

of sufficient length to qualify the soldier, would a record of desertion in any other enlistment disqualify him?[5]

The shortfall could not be made up with time from a dishonorable period of service, replied Lee, but a bounty accruing from one enlistment would not be lost through dishonorable conduct in a separate enlistment "unless expressly by sentence of a general court martial."[6] This time, he answered without comment on the scope of his official authority. The bulk of Lee's work focused on issues of criminal law until he left the Army in 1862, but other issues continued trickling his way.

Lee appears to have reconsidered his earlier interpretation of the Judge Advocate's role and dealt willingly with these additional questions. In 1857, for instance, he answered several requests for advice on per diem allowances. In May he advised the Secretary of War that orderlies at the War Department and Army headquarters were prohibited by law from receiving special allowances above the standard commutation for enlisted men.[7] In December, a lieutenant in Rhode Island was informed that fatigue duty pay could be issued from the paymaster's funds if the quartermaster's appropriations were exhausted, as the source of that disbursement was set by regulation rather than by law.[8]

On occasion court-martial proceedings produced other legal spinoffs for the Judge Advocate. One came his way just days before the attack on Fort Sumter. In 1861 an officer of the Marine Corps inquired of the Navy Secretary whether his brevet rank took precedence among the members of a recently convened military court.[9] This question was forwarded to the War Department, where Judge Advocate Lee considered the matter.

He found that Congress had placed the rank of Army and Marine

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[5] Letter from Commissioner of Pensions Heath to Judge Advocate John Lee (5 Mar. 1853), Letters Received No. 10.
[6] Letter from Judge Advocate John Lee to Commissioner Heath (6 Mar. 1853, 1 Letters Sent 154.
[7] Letter from Judge Advocate John Lee to the Secretary of War (4 May 1857), 1 Letters Sent 209.
[8] Letter from Judge Advocate John Lee to Lieutenant A. R. Eddy (7 Dec. 1857), 1 Letters Sent 213.
[9] Letter from Major Terrell to the Secretary of the Navy (2 Apr. 1861), Letters Received No. 89.

Corps officers on equal footing, and that Army officers only took their place in court-martial proceedings according to brevet rank when the board was composed of more than one Corps. As Congress had provided for the staff and line of the Marines to compose a single Corps, he concluded that brevet rank would not apply to a board comprised entirely of Marine officers.[10]

III. THE PROCESS COMPLETED

With the outbreak of the civil war the Judge Advocate's workload grew rapidly. In 1862 Congress established a new position for the Army, the office of Judge Advocate General.[11] Joseph Holt assumed that post with the rank of colonel, and during the war had seven or eight judge advocates on duty in his Washington office to assist with the varied legal questions that crossed his desk.[12]

Some, such as that posed by the family of a soldier in a New Hampshire volunteer regiment, would have come up sooner or later, even in peacetime. They wanted to know if military wages entrusted to his agent could be "wrested from their use" by creditors. Holt replied that the public policy considerations which protected a soldiers' pay from garnishment while it was still in government hands did not apply after he had received it. It then became his private property, and creditors could move against it.[13]

Other problems grew directly from the circumstances of war. In one instance, the Surgeon General of the Army wanted to know whether certain legislation authorized him to furnish artificial limbs for disabled officers. In the report back, Holt concluded that he could not. The congressional appropriation distinguished between

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[10] Letter from Judge Advocate John Lee to the Secretary of War (3 Apr. 1861), 1 Letters Sent 228.

[11] Act of July 17, 1862, ch. 201, sec. 5, 12 Stat. 598. The same act also authorized one judge advocate for each army in the field. *Id.*, at sec. 6.

[12] Fratcher, *History of the Judge Advocate General's Corps, United States Army*, 4 Mil. L. Rev. 97 (1959).

[13] Letter from Judge Advocate General Joseph Holt to the Secretary of War (17 Oct. 1862), 1 Letters Sent 378.

officers and enlisted men, with commissioned personnel being expected to purchase their own.[14]

Another of the war related questions came from Chester, Pennsylvania. The chaplain of a military hospital in that city wanted to know whether letters written by Confederate prisoners, to be mailed South under flag of truce, had to carry U.S. postage.[15] Holt's response was to the point. "I take it for granted that the postage on all such letters should be paid. They are on the private business of the parties writing them, and as they are public enemies, it is not perceived on what ground they can be permitted to claim privileges denied to our citizens."[16]

Two interesting "firsts" in American military law came up during the early years of the war. On July 1, 1862 Congress enacted an income tax provision. The Army's Paymaster General was uncertain of some of the effects that this legislation might have on the service. In September the Judge Advocate General issued his first tax opinion.

Holt reported that salaries were only to be taxed above the first $600. This tax was to be levied on both the pay and allowances of officers, as it appeared that Congress regarded allotments for food, quarters and subsistence to be taxable salary. When allowances were drawn in kind, the issuing officer was to retain three percent of that amount. If that was impractical he could collect the tax from some monied disbursement to the officer.[17]

Following quickly on this came the first claims opinion. Two residents of Baltimore, a Mr. Hartzberg and a Mr. Stieful, were demanding compensation for 400 barrels of flour that union soldiers had seized in a Fredericksburg store. The troops apparently took that stock to be the property of disloyal citizens, and both men insisted that they were faithful unionists.

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[14] Letter from Judge Advocate General Joseph Holt to the Secretary of War (31 Oct. 1862), 1 Letters Sent 394.
[15] Letter from Chaplain Graham to Judge Advocate General Joseph Holt (29 Sep. 1863), Letters Received No. 504.
[16] Letter from Judge Advocate General Joseph Holt to Chaplain Graham (1 Oct. 1863), 5 Letters Sent 71.
[17] Letter from Judge Advocate General Joseph Holt to the Secretary of War (20 Sep. 1862), 1 Letters Sent 358.

In his letter to the Secretary of War on the sufficiency of their claim, Colonel Holt reported the following:

> They allege that on the breaking out of the rebellion they had a commercial agency at Fredericksburg, managed by one G. Gottschalk, that he had then on hand a stock of goods which he sold for "Confederate notes," and these he exchanged for the flour in question in the hope of being able to send it north, and thus protect his principals from loss.

Two of their employees verified this statement of facts with affidavits, but Holt was of the opinion that their additional testimony added nothing of value to the original petition. But it was noted:

> There is, however, superadded the affidavit of G. Gottschalk, who states broadly that the flour when seized was the property of Hartzberg and Stieful. He however enters with no explanation, and makes no allusion to the history of the flour as given by the claimants, yet that history, in all its details, must have been well known to him, and it is not a little singular that he should have totally omitted to refer to it.
>
> The flour was found and taken in a disloyal state, and in the store of Thomas F. Knox, whose brand as a manufacturer it bore. When to this coincidence is added the probability that both Knox and Gottschalk were disloyal, it is but reasonable that the government should exact the fullest measure of proof, as to when, and the precise circumstances under which this flour became the property of the claimants. With all these circumstances, Gottschalk must be familiar, and he should be held to set them forth distinctly before the claim is recognized. Should his testimony upon this point be satisfactory, there will exist no reason why the claimants should not be paid the value of the flour.[18]

Such cases made up a small but important part of the Judge Advocate General's workload during the Civil War. Though not qual-

[18] Letter from Judge Advocate General Joseph Holt to the Secretary of War (18 Oct. 1862), 1 Letters Sent 378.

itatively different from some of the issues dealt with by the Judge Advocate prior to 1861, their numbers grew. During the Civil War the Judge Advocate General became a regular, rather than occasional advisor on civil questions.

Few of these cases ever found their way into published legal compilations and reached a wider audience, but in 1865 a selection of key opinions were published as THE "Digest of Opinions of The Judge Advocate General." Prepared for the instruction of judge advocates serving in the field,[19] this volume served general notice of the Judge Advocate General's emerging role as War Department legal advisor.

IV. THE NEW ROLE

Surviving department records show that Army judge advocates gave advice on a wide range of legal problems in the years following the war.[20] A Congressional report of 1880 shows that their expanded role was taken for granted. Issued in support of a bill passed that year to establish the office of Judge Advocate General for the Navy and Marine Corps, it drew on the experience of the only branch that had judge advocates.

The House Committee on Naval Affairs reported as follows:

> The business which it is proposed to assign to this office consists of the records of all courts-martial, courts of inquiry, boards for the examination of officers for retirement and promotion, the preparation of charges and specifications for courts-martial, the organization of courts and boards, the various claims filed for investigation, numerous questions of law, regulation and other matters . . . Public business of the same character devolving upon the War Department is discharged by officers of the Army under the direction of the Secretary of

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[19] Letter from Judge Advocate General Joseph Holt to G. Sturgis, Esq. (6 Jan. 1865), 11 Letters Sent 353.

[20] A chronological log of issues submitted to the Judge Advocate General in the post-war period can be found in 2 Letters Received.

> War, there being a provision of law for their appointment to this service under that department. . . .[21]

Earlier legislation pertaining to the Army Judge Advocate General made no reference to specific responsibilities outside the criminal justice field. When Congress elevated the Judge Advocate to the rank of Brigadier-General in 1864, it was provided that, in addition to his criminal justice activities, he would "perform such other activities as have heretofore been performed by the judge advocate-general of the armies of the United States."[22] This provision went unmentioned in the floor debates leading to passage of the legislation. It was, at most, an acknowledgement that the Judge Advocate General had been taking on miscellaneous assignments at his own initiative. No reference to this expanding jurisidiction is found in War Department General Orders of the Civil War period either.

The report of the House Committee on Naval Affairs identified a state of facts that grew from customary practice, and further evidence of the informal beginning is found in the statement of an officer who was there when many of these developments took place.

In 1878, then Judge Advocate General William McKee Dunn recorded the following:

> Important as is the duty of properly reviewing the proceedings of military courts, before which are often raised questions of law of considerable difficulty, and where sentences may involve the most serious consequences to the parties tried, it is rather the other branch of the business of the Bureau which has given to the office of Judge Advocate General its principal consequence. He is in effect the Law Officer of the War Department, holding practically the same position of general advisory counsel to the Secretary of War as is held by the several solicitors or Assistant Attorneys General towards the Chiefs of the Executive Departments to which they are attached. Such was peculiarly the relations between General Holt and Secretary Stanton, and his successors, and this relation has not since been materially modified.[23]

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[21] H.R. Rep. No. 459, 46th Cong., 2d Sess. (10 Mar. 1880).
[22] Act of June 20, 1864, ch. 145, sec. 6, 13 Stat. 145.
[23] W. Dunn, *A Sketch of the History and Duties of the Judge Advocate General's Department, United States Army* 7-8 (1878).

The Judge Advocate General's jurisdiction grew on a piecemeal basis. Responding to requests for advice from various military and civilian officials, he gradually assumed responsibility for the War Department's legal activities. His office grew not by deliberate administrative plan, but in response to the needs of the military community.

BOOK REVIEW: CRISIS IN COMMAND

Gabriel, Richard A., and Paul L. Savage, *Crisis in Command - Mismanagement in the Army.** New York, N.Y.: Hill & Wang, 1978. Pp. 242. Cost: $10.00.

Reviewed by Lieutenant Colonel John Schmidt III**

The United States Army in Vietnam was not a cohesive, functional organization, and most of its failures can be attributed to an abandonment of leadership responsibility by its officer corps. This lack of cohesiveness has carried over into the era of the all-volunteer Army of the 1970's, and places the Army in a situation of doubt as to its ability to function efficiently in peacetime, but more importantly, in the next war.

In Crisis in Command - Mismanagement in the Army, Professors Gabriel and Savage allege that the United States Army and its officer corps require significant reform. This is needed, say the authors, because the Army's leaders have forsaken traditional military ethical values in favor of the free-enterprise system's pursuit of individual values and goals. They believe the officer corps has lost its ability to inspire confidence, loyalty, and cohesiveness among the Army's soldiers. It is their position that strength of character, integrity, and honor have been replaced by a philosophy of managerial efficiency which emphasizes short-term goals at the expense of long-term efficiency.

The book focuses on the operational performance and behavior of the United States during the Vietnam years. According to the authors, two things became obvious during that time. First, despite ten years of efforts, the Army would not win the Vietnam war. Second, an internal decay of traditional military ethical values was taking place. Indicators of decay were the high drug use rate, refusal to execute combat orders, increased desertion rates, and at-

*This book was briefly noted at 82 Mil. L. Rev. 215 (1979).

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tempts to assassinate officers through "fragging" and misdirected fire while in combat. As Gabriel and Savage state, "the Army began to border on an undisciplined, ineffective, almost anomic mass of individuals who collectively had no goals and who, individually, sought only to survive the length of their tours."[1]

Those of us who served in Vietnam can agree with many of the assertions set forth in the book. We should understand, however, that, while the authors have assembled impressive data to support this thesis, they lay the blame for the state of the Army almost solely on the lack of leadership, integrity, and high ethical standards of the officer corps. In so doing, they have addressed only one aspect of the entire system and have failed to show that external forces played as much of a part, if not more, in any decline of quality of leadership within the officer corps. But even with this thought in mind, the book is an excellent analysis of many of the factors which drive our officer corps today. As one well-known sports announcer is prone to say, Gabriel and Savage "tell it like it is!"

Gabriel and Savage posit that the lack of an officers' code or creed, such as that formulated by the U.S. Army War College study on military professionalism,[2] has given rise to the problem. Because it has no such code, the officer corps has degenerated to the point that ethics and honor have given way to a philosophy of "don't rock the boat," "it all counts for twenty," and "you can't tell the general that," to insure career enhancement.[3] They claim that officers have become so concerned with pleasing their bosses and avoiding that one mistake which is career destroying, that they have subverted that ethical behavior which has been traditionally accepted as a pillar of strength for leaders. This managerial careerism, which has befallen the officer corps, has resulted in the prevalent practice of blocking, distorting and diluting almost any data that might result in personal performance being suspect of anything less than perfection.[4] The practice of "ticket punching" and advancement at anyone's expense is the norm rather than the exception.

Gabriel and Savage submit that this decay began immediately

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[1] R. Gabriel & P. Savage, Crisis in Command - Mismanagement in the Army (1977).
[2] Study on Military Professionalism, U.S. Army War College (1970).
[3] *Id.*, at 99.
[4] *Id.*, at 61.

following the Second World War, as the Army adopted more and more corporate business practices. Internal control practices increased until, with the McNamara years, we had progressed to the point that the officer corps began not to lead but to manage the Army. The Army not only had adopted modern business corporation technology, but its language, style and ethics. The Army ceased to be a true military establishment in the historical and traditional sense.[5]

How do we confront this dilemma? As implied above, the authors propose that an officer code or creed be adopted which exemplifies the virtues and ethics necessary for effective military leadership. Adoption and enforcement will be difficult, however, as those in power who could make the change are the same ones who have manipulated the system to advance to their current positions.[6] An external force therefore is necessary to demand a return to, and instill in young officers, the traditional military ethical behavior, where the concept of "looking upward" is not the driving force in an officer's behavior. To this end, Savage and Gabriel propose that the "up or out" system be abolished. This system, they say, perpetuates the drive for career management at the expense of leadership, honesty, and integrity.

While we may agree with much of what the authors suggest, the fact remains that desirable changes will be difficult to implement in today's environment.

A brief note on the construction of the book: I personally found *Crisis in Command - Mismanagement in the Army* to be the finest examination and collection of data on contemporary officer corps behavior to be found anywhere. It is well researched and is documented with exceptional footnoting. The book also contains a splendid biographical essay. The biggest flaw in the work must be its length. Although relatively short in number of pages, the entire text could easily have been condensed to half their number. Repetition is the word in many cases; I found myself re-reading the same idea five or six times throughout the book. A little more editing and organization would have improved the message immensely.

Would I suggest this book for others to read? For an officer with

[5] *Id.*, at 19.
[6] *Id.*, at 88-89.

over ten years service, only if you want to reinforce what you honestly already know. For the officer just beginning his military career - a must! The truth sometimes hurts!

BOOK REVIEW: A REFERENCE FOR LABOR RELATIONS LAWS IN WESTERN EUROPE

Murg, Gary E., and John C. Fox, *Labor Relations Law: Canada, Mexico and Western Europe*,* New York, N.Y.: Practicing Law Institute, 1978. Two volumes. Vol I, pp. xxix, 738; vol. II, pp. ix, 695.

*Reviewed by Major Dennis F. Coupe.***

Volume One of this book contains information on the labor relations laws of Canada, Mexico, Great Britain, France, Belgium, the Netherlands and Italy. Volume Two covers labor relations in West Germany and under the Common Market agreements. The complete texts of Title VII of the Treaty Establishing the European Community and the West German Co-Determination Act of 1976 are included as appendices.

For each country considered there is a concise, narrative discussion of indigenous labor relations systems, followed by model collective bargaining clauses and charts or tables depicting average wage scales, hours of work and pension levels. Indices of statutory and decisional progressions in the labor relations histories of each country are also provided.

Although directed primarily to multinational corporate attorneys, *Labor Relations Law* will be useful for those judge advocates dealing with international contracting, claims and labor relations laws. Of particular interest to Army judge advocates are the ninety-five pages of discussion in Volume Two devoted to labor relations in West Germany.

Civilian personnel law and labor relations with local national employees and third nation workers are complex and important parts

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*Briefly noted at 82 Mil. L. Rev. 218 (1979).

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of the workload of many Army judge advocates assigned in Europe. Large numbers of the Army's 80,000 member civilian workforce in Europe are foreign nationals, whose relationships with their employer are controlled by principles of the labor law of the host countries, by Article IX of the SOFA, and by the supplementary agreements, tariffs and regulations.[1]

Training in foreign labor relations can be expedited and reliance upon local expertise can be minimized if a good reference source is available. *Labor Relations Law* does not answer a great number of questions of concern to labor counselors in Europe, but it does provide a good initial reference point for further research.

The West German and Scandinavian experiences with industrial democracy date from 1920, and have had a profound influence on the development of labor relations in many common market countries. As the writers of *Labor Relations Law* observe, helpful initiatives for resolution of labor relations difficulties in the United States may be discovered by looking abroad: "[B]oth corporate and union representatives from the United States and Canada, in gaining an understanding of West German labor laws, may also obtain a glimpse of issues which may increasingly confront labor and business on the North American continent."[2]

West German labor laws recognize two complementary worker rights: union representation which has parallels in the United States under our National Labor Relations Act, and industrialized democracy which has almost no counterpart in the United States.

Industrialized democracy is the term used to describe the direct contacts of worker groups with management officials, without union involvement, through Works Councils. Works Councils give employees a role in the decisionmaking process of the larger West German corporations, either through employee participation (the right of workers to be consulted before actions are taken by management), or through the stronger right of co-determination (the right of worker representatives to vote and have an active role in corporate decisionmaking).

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[1] An example is USAREUR Regulation No. 690-64.
[2] 1 G Murg & J. Fox, Labor Relations Law: Canada, Mexico and Western Europe 740.

Although industrialized democracy sometimes results in employees controlling traditional management functions, such as hiring preferences, productivity, and employee behavior, management normally has a slightly greater vote and both sides are severely restrained by comprehensive labor statutes that go far beyond federal controls in the United States. The union role in West Germany is confined to collective bargaining on issues not settled directly between Works Councils and management.

Understandably, unions in the United States have resisted industrialized democracy, preferring to delineate the forces and functions of labor and management. "Us-against-them" attitudes that are sometimes fostered by the American labor movement contrast markedly with the cooperative, team effort concepts underlying industrialized democracy.

Without proselytizing on the strengths or weaknesses of the respective systems of labor-management relations, the authors of *Labor Relations Law* point out many differences among the ways foreign countries address essentially similar concerns.

In West Germany, most Western European countries, and in Canada, for example, employees are paid severance indemnities that are generally more substantial than what United States employers pay their discharged employees. Termination pay can be as much as two years' salary. In the United States, unemployment laws usually shift the burden of compensating laid-off employees away from the corporate owners to the taxpayer.

Unemployment in many Western European countries is kept at comparatively low levels through the technique of "worksharing," a system that simply reduces the hours of work in periods of slowdown, in order to minimize the need for lay-offs.

Significant differences between labor relations in Western Europe and the United States are evident in many areas discussed in *Labor Relations Law*. Collective bargaining agreements are the key to the labor-management relationship in the United States, but play a more restricted role and are usually unenforceable at law in most Western European countries. In West Germany there is no exclusive representation of one group of employees by any one union; employees in a bargaining unit are often represented by several different unions.

Another difference between the systems of labor relations in the United States and Western Europe is the usual method of dispute resolution. Strikes are less common in the United States due to greater reliance on arbitration of grievances. In West Germany, "warning strikes" of limited duration undercut the effectiveness of the arbitration process. Interestingly, strikes in West Germnay are illegal if the resultant financial losses are greater than the advantages sought by the union.

Most of the differences noted stem from the higher degree of statutory control of labor relations in the Western European countries. In the United States, the emphasis is on letting the union representatives and management agree to a contract within broad statutory guidelines. An illustration of this is the cost of living increases which are required and regulated by law in West Germany, but are the subject of heated bargaining in the United States system of labor-management relations.

Perhaps the principal shortcoming of this book for judge advocates is its failure to describe in greater detail the day-to-day functioning of the West German Works Councils. Some discussion of the Personnel Representation Act of 1974, and its extension of the requirement for local Works Councils to agencies with more than five employees, would also have been welcome.

But in sum, this is a well written, valuable reference work that belongs on the shelves of at least some of our higher level command law libraries.

The particular value of the book is twofold: as a general reference work, and as a basis for challenging many of our own assumptions about ideal labor-management relationships. Mr. Meany and other American labor leaders often denounce the dumping of "cheap foreign goods produced by cheap foreign labor." In learning more about foreign labor systems, readers of *Labor Relations Law* may be forced to acknowledge that "cheap foreign labor" is sometimes a shibboleth for a highly organized, motivated and productive workforce that is producing quality products at lower prices because their system of labor relations encourages rather than discourages employee-employer teamwork and greater individual responsibility for job accomplishment.

BOOK REVIEW: RACIAL DISCRIMINATION AND MILITARY JUSTICE

Perry, Ronald W., *Racial Discrimination and Military Justice.* New York, N.Y.: Praeger Publishers, 1977. Pp. 97. Bibliography.

*Reviewed by Colonel John S. McInerny**

In reading the book, "Racial Discrimination and Military Justice," the reader may well let its title and the opening few pages affect his eventual assessment of the book's merit. This would be a serious mistake, for the writer has provided a fascinating, albeit somewhat statistically overwhelming, overview of the manner in which the military justice system operates in what he calls "the sea services"—the United States Navy and the United States Marine Corps.

In his premise, the author identifies his purpose as "address(ing) the question of whether blacks and whites receive similar treatment in the criminal justice system of the United States Navy and Marine Corps."[1] He indicates his project arose "in connection with the efforts of the Department of the Navy to obtain an objective assessment of the *extent of racism* in the sea services and its impact upon military life"[2] (emphasis added). Mr. Perry carefully excludes from his study any evaluation of prison conditions in the sea services or any evaluation of the basic fairness of the Uniform Code of Military Justice.

Rather, he limited his scope to an analysis of "the consequences of the operation of the existing criminal justice system" and addresses himself to the basic question of "whether or not blacks and whites are treated differently on an institutional level."[3]

When the reader realizes that the author is an Assistant Profes-

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[1] R. Perry, Racial Discrimination and Military Justice vi (1977).
[2] *Id.*
[3] *Id.*

sor of Sociology and Senior Systems Analyst with the Institute for Social Research at the University of Hartford in West Hartford, Conn., with prior teaching stints at Arizona State University, the University of Washington, and Pacific Lutheran University, the suspicion may well arise that Dr. Perry has not only defined his area of inquiry, but has already determined the result he is going to reach.

Little is done to allay the reader's suspicions as he reads the first few pages of Dr. Perry's book, and finds what appears to be several rather obvious misconceptions about the manner in which the military justice system operates.

He notes, for instance, in describing the basic operations of the military justice system, that enlisted men are ordinarily tried by courts composed of commissioned officers, although they "may petition to have other enlisted men—superior to him in grade—form one-third of the court."[4] The choice of language is unfortunate because, without ever directly saying so, the author conveys the impression this is a privilege accorded rather than an absolute right.

He also notes that military judges are assigned to special courts-martial only under "special circumstances."[5] This statement, while not only untrue, is coupled with the observation that most criminal cases in the military are tried by special courts-martial and again conveys the impression that most military persons are tried by courts operated without the guidance of the trained legal mind of a military judge. He also points out that special courts-martial cannot adjudge either a dishonorable or bad-conduct discharge, which is somewhat misleading.

Finally, Dr. Perry points out that the lowest level of the courts-martial system is the summary court, wherein "there is the implicit requirement that the accused agrees that he is guilty and that the punishment meted out by the court is reasonable."[6] A number of military defendants who have been acquitted by such summary courts would perhaps take issue with this statement.

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[4] *Id.* at 5.
[5] *Id.* at 6.
[6] *Id.*

Dr. Perry then carefully analyzes a mass of data collected from a very representative cross-section of cases which were processed through the Navy/Marine Corps courts-martial system during the last quarter of 1972 and reaches a conclusion which may surprise some who are not familiar with the military courts-martial system. Dr. Perry concludes that his "study of the treatment of blacks and whites in the criminal justice system of the Navy and Marine Corps has uncovered virtually no evidence of institutionalized discrimination against either racial group;"[7] i.e, white or black. Dr. Perry unequivocally states that his "data indicates that the application of criminal justice in the sea services is remarkably even with respect to race."[8]

The statistical investigation which the author has undertaken in order to reach his ultimate conclusion is most impressive and lends considerable weight to his findings. Dr. Perry first solicited data from all naval and Marine Corps prisons, stockades, and brigs; all but a handful complied with his requests (881 prisoners out of a probable total of 948). He then compares the racial patterns of these individuals with the racial composition of the services involved, attempts to determine offense patterns, and compares the length of sentences.

In Dr. Perry's first chapter, he traces the history of black participation in the sea services and the integration of the services as officially implemented by President Truman's Executive Order 9981, dated July 26, 1948. He notes, for instance, that blacks have served alongside whites in the Navy for over two hundred years—generally in combat roles during the first hundred years—and that it was only during the twenty year period between 1922–1942 that black enlistments were not accepted by the Navy.[9] It is fascinating to learn, for instance, that during the Civil War, twenty-five percent of the fleet was black.[10]

Black participation in the Navy began to decline about the turn of the century, and the author theorizes this may have been because

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[7] *Id.* at 83.
[8] *Id.*
[9] *Id.* at 15.
[10] *Id.*

the now more mechanized Navy required educational skills which a large proportion of blacks did not then possess. It was during this period that the concept of blacks serving in the Navy largely as messmen or stewards arose.

Dr. Perry then goes on to point out that black participation in the Marine Corps did not begin until 1942, and that even then it was on a segregated unit basis.[11] These all black units were absorbed into other units in 1949, and by 1954, the Marine Corps had become fully integrated.

In 1949, 7.5% of all enlisted service members were black; however, only 4.0% and 1.9% of the Navy and Marine Corps, respectively, were black. By 1971, 12.1% of all enlisted service members were black, but in 1969 (the nearest comparable year), 4.8% of the Navy was black while the Marine Corps percentage had risen to 10.7%.[12]

Dr. Perry then undertakes a very lengthy and careful statistical analysis of the courts martial system of the sea services, which is virtually impossible to summarize in this report since the very nature of such an analysis requires detailed comparisons that carefully move from item to item.

For instance, he compares the total number of courts-martial convened by both the Navy and the Marine Corps in 1972, and then determines a rate per thousand per service and per type of court-martial; i.e., 2.27 per thousand in the Navy and 10.37 per thousand for the Marine Corps.[13] He then examines the conviction rates and finds that acquittals or dismissals are virtually unknown in general courts, more frequent in special courts, and most frequent at the summary level.[14] He ascribes these results, correctly, I suspect, to the greater care in preparation for trial of the more serious offenses.

He then examines the results of these convictions by court and race, and he finds almost no differences between the races. For instance, in special courts in the Navy, the conviction rates were

[11] *Id.* at 17.
[12] *Id.* at 19.
[13] *Id.* at 20.
[14] *Id.* at 21.

94.12% for whites and 100% for blacks; in the same courts in the Marine Corps, the figures are 91.67% for whites and 88.46% for blacks.[15] He concludes that the conviction rates for blacks in the Navy are slightly higher than for whites but they are slightly lower in the Marine Corps.

The author then examines the makeup of the prisoner population of the two sea services and finds that during the last quarter of 1972, 881 sailors (.17 percent of enlisted grade sailors) and 1626 marines (.92 percent) were confined in brigs or prisons.[16] This shows a confinement rate of 1.74 per 1000 sailors and 9.16 per 1000 marines, or a confinement rate about five times higher for marines than sailors. This figure is consistent with the different courts-martial ratio between the two services.

By examining the age groups in the two services, Dr. Perry notes that enlisted marines are, as a group, younger than the sailors, and he finds 76.28 percent of the sailors confined and 74.24 percent of the marines confined are 21 years old or less.[17] Moreover, 95.68 percent of all sailors confined and 99.08 percent of all marines confined are under 30 years of age. He also finds the incarcerated persons in both services to be less educated than the nonconfined personnel. He also finds most of them to have come from the two lowest pay grades.[18]

Dr. Perry also finds that while only 7.29 percent of the Navy is black, almost 20 percent of the Navy prisoner population is black. On the other hand, about 15.8 percent of the Marine Corps enlisted men are black, and they only make up 23.8 percent of the prisoners.[19] Dr. Perry then examines the white prisoner population and finds it not too dissimilar from the Black population, and he concludes that "while blacks and whites in the lowest educational categories are treated at least similarly . . . many blacks in the upper educational grouping have a disproportionately high incarceration rate even when age is taken into account."[20]

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[15] *Id.* at 23.
[16] *Id.* at 24.
[17] *Id.* at 25.
[18] *Id.* at 26.
[19] *Id.* at 29.
[20] *Id.* at 35–36.

In Chapter 3 of his book, Dr. Perry takes a long look at the sensitive and long-running question of whether blacks commit more crimes—and specifically, more violent crimes—than whites. The author suggests that the military justice system presents a somewhat unique opportunity to examine this question because (1) conviction rates as opposed to arrest rates are more constant in the military; (2) the quality of counsel is much more standard in the military, and (3) greater control is exhibited in the military over arresting personnel and those who operate the military justice system.

Dr. Perry first divides, somewhat arbitrarily, but none the less logically, all military offenses into four categories: (1) major military offenses which are also criminal in civilian life (murder, rape, robbery, etc.); (2) confrontation or status offenses (disrespect, disobedience, escape, etc.); (3) unauthorized absences (AWOL, desertion, etc.); (4) other military (civilian) offenses (forgery, drunk-driving, perjury, etc.).[21]

He notes that nearly 70% of all incarcerated prisoners are in for AWOL-type offenses, and that this figure is relatively constant for both services.[22] He also notes that both the Navy and Marine Corps have remarkably similar incarceration rates for the four categories of offenses listed above; i.e., Category I—Navy 7.27%; Marine Corps 9.80%; Category II—8.00 to 6.54%; Category III—75.00 to 73.53%; Category IV—9.73 to 10.13%.[23]

Dr. Perry then breaks these figures down by race, offenses, and service and finds that, in the Navy, the figures look like this: Category I—whites, 3.73%, blacks, 20.71%; Category II—whites, 7.62%; blacks, 9.47%; Category III—whites, 78.85%, blacks, 60.36%; Category IV—whites, 9.80%, blacks, 9.47%. Similar comparison for the Marine Corps shows: Category I—6.62% to 17.99%; Category II—5.63% to 8.88%; Category III—80.76% to 54.91%; Category IV—6.99% to 18.22%.[24]

The author then examines these figures in relationship to age and education; and, after having done so, he comes up with the following conclusion:

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[21] *Id.* at 47.
[22] *Id.* at 45.
[23] *Id.* at 48.
[24] *Id.* at 52.

> In summary, our findings do not lend support to the argument that blacks and whites of similar social status have similar rates for the commission of violent offenses. Since this is the case, indirect support is afforded the argument that the basic socialization of blacks and whites is fundamentally different and, in later adult life, these differences persist even if other social factors are held constant. To fully examine this hypothesis would go far beyond the scope of the present data. At best, the data at hand are sufficient to vitiate the social-status argument and to suggest that the socialization approach, pending further empirical analyses, is the next most powerful alternative explanation for the black-white violent-crime differential detected here.

In examining the sentencing practices of military courts, the author first observes that the military presents a unique opportunity to assess variations in racial sentencing patterns because all of the crimes are handled by the same type of courts, operating under the same rules, and dealing with offenders who may have come from different backgrounds but who now live in similar housing and receive similar pay.

It is Dr. Perry's conclusion that, contrary to similar civilian studies on this project, the "analysis of military data shows no significant black-white sentence differential in any of the four offense classes."[25] "Also black and white prisoners remained represented in equal proportions in the sentence categories when offenders with prior records were separated out."[26] Dr. Perry notes that offenders with long prior offense records in the military are a fairly small group of persons due to the policy of the services to separate those who have constant problems with military discipline.

In order to truly appreciate the impact of Dr. Perry's book and conclusions, the reader really has to carefully read the book—and particularly the statistical charts, so that any fears of "doctoring" the statistics can be allayed. If any such has occurred in this book, this reviewer could not detect it, and the results of the various studies and charts provided a fascinating overview of the military

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[25] *Id.* at 75.
[26] *Id.*

justice system in the Navy and Marine Corps. The book is recommended highly for those who are involved in or interested in the military justice system.

BOOK REVIEW: CONFESSION AND AVOIDANCE

Jaworski, Leon, with Mickey Herskowitz, *Confession and Avoidance.** New York, N.Y.: Anchor Press/Doubleday & Co., Inc., 1979. Pp. 326.

*Reviewed by Captain(P) Joseph A. Rehyansky***

The real reason for the Saturday Night Massacre, advanced by one contemporary wag, was that Richard Nixon simply could not abide Archibald Cox's bow ties. I found that explanation only slightly less amusing—and plausible—than another offered shortly after that infamous dismissal: that the President wearied of having to say "Special-Watergate-Prosecutor-Archibald-Cox" all the time. The sounds, to be sure, do not trip from the tongue. But "Special-Watergate-Prosecutor-Leon-Jaworski" provides little aural or elocutionary relief, and our 37th President would have served himself better by learning to love bow ties instead of licensing Jaworski to do him in.

Leon Jaworski is a first generation American. He earned his legal spurs in Waco, Texas, in 1929, as the appointed defense counsel for a black farm worker accused of the ghastly murder of a white couple, the parents of a three-year old daughter. The defendant protested his innocence, and Jaworski came to believe him. He believed in him through the obscene phone calls, letters and threats that were the lot of every energetic white lawyer who zealously defended an unpopular black client in that time and place; believed in him through the trial, the conviction, the death sentence, and the appeal; believed in him through the preparations for his retrial and continued to believe in him until the man the defendant swore actually committed the crime was located and established a legitimate, unimpeachable alibi. After his client was electrocuted, Jaworski

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*This book was briefly noted at 84 Mil. L. Rev. 145 (1979).

**JAGC, U.S. Army. Chief, Career Management, Reserve Affairs Department, The Judge Advocate General's School Charlottesville, Virginia, 1978 to present. Graduate, 26th Advanced (Graduate) Course, TJAGSA, 1978. Author of book reviews published at 79 Mil. L. Rev. 199 (1978) and 75 Mil. L. Rev. 187 (1977). Regular contributor to *The National Review* and other periodicals.

learned that he was the beneficiary of the man's World War I GI life insurance policy. He was surprised and touched at this feeble gesture of thanks from a man who, he had now to conclude, was an accomplished liar, a depraved and remorseless murderer. "Of course," deadpans Jaworski, "I was glad I had not known earlier that I had a beneficial interest in the death of my client."

Jaworski's story ends nearly a half century later, as he wraps up his duties as counsel to the House Ethics Committee investigating the Korean influence-buying scandal. That part of the book is the least compelling, as, indeed, was the scandal itself. "Koreagate" was perceived as petty—albeit widespread—corruption, and the investigation was hampered from the start by the fact that the House of Representatives was investigating itself. Other factors, too, contributed to an unsatisfactory resolution. Most of the miscreants were Democrats; furthermore, while Watergate had its Woodward & Bernstein to fan the flames and a single vulnerable archvillain to bring down, the Korean scandal was handled indifferently by the press, and there were simply too many rats to catch in one big trap. Finally, there is the argument that, however reprehensible may have been the acts of the congressmen who took the money, the Koreans did nothing morally wrong in offering it; they were the representatives of a small, helpless country trying to curry favor with a superpower. Who, reviewing America's foreign policy disasters of the past decade or more, can blame Korea for declining to bank its survival exclusively on our willingness to honor those open covenants, openly arrived at?

During the interval between his representation of the indigent Jordan Scott and the House Ethics Committee, Leon Jaworski grew prosperous and skillful. He volunteered for service in World War II at the age of 36, served in the JAGC, and prosecuted the first war crimes trials organized under the provisions of the Geneva Convention (four months before the Nuremberg Trials began). For years he was retained by the litigious, legendary Texas wildcatter Glenn McCarthy, the model for Jett Rink in Edna Ferber's novel, *Giant* (the part played by the late James Dean in the movie). He successfully represented Lyndon Johnson in 1960 when Johnson's right to run simultaneously for re-election to the Senate and election to the Vice-Presidency was challenged (he later declined President Johnson's grateful offer of a Supreme Court seat), served as President of the American Bar Association, and prosecuted Mississippi

Governor Ross Barnett for his 1962 defiance of federal integration orders. Jaworski ran the Texas end of the Warren Commission's investigation of President Kennedy's assassination (he vigorously and convincingly defends the Commission's conclusions), and capped a career teeming with the kinds of highlights most lawyers only dream of with his 8 - 0 victory before the United States Supreme Court in the case of *The United States of America v. Richard Nixon*, making him the lawyer most responsible—with the exceptions of John Dean and Nixon himself—for ending Richard Nixon's political life.

Jaworski's memoir is light and airy, fast-paced and interesting. It does not pretend to great literary stature or penetrating analysis. It is the author's recollection of 50 exciting years in the practice of law, of the famous and infamous with whom his craft brought him into company, of the causes he pled, the disappointments and triumphs he experienced. It was written "with" Mickey Herskowitz, a friend of one of Jaworski's children and a successful, glib young "ghost" who has recently provided the same service to sportscaster Howard Cosel and Dan Rather of "Sixty Minutes" fame. I am naturally indisposed toward books written "with" someone else because of the implied admission by the "author"—that he can't write. Of course, publishers' editors frequently give the same treatment to awkwardly written but interesting manuscripts, without benefit of byline. But here and there throughout this work one stumbles upon the kind of indictable offense that suggests sub-literacy: whom are we to hold responsible for confusing "infer" and "imply," or for a reference to John Kennedy as our youngest President ever? Flaws of this sort are an unpleasant surprise in a memoir by a man of Jaworski's stature. But despite them, and despite its superficiality, *Confession and Avoidance* cannot help being an important book; Jaworski has witnessed, and has himself made, a good part of contemporary history.

BOOK REVIEW: BIG STORY

Braestrup, Peter, *Big Story: How the American Press and Television Reported and Interpreted the Crisis of Tet 1968 in Vietnam and Washington*. New York, N.Y.: Anchor Press/Doubleday & Co., Inc., 1978. Pp. xvii, 606. Cost: $8.95.

*Reviewed by Captain Van M. Davidson, Jr.**

> The daily press and telegraph fabricate more myths (and the bourgeois cattle believe and enlarge upon them) in one day than could have formerly been done in a century.[1]
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> Karl Marx, 1871

The Tet offensive of 1968 was a momentous event in recent American history. Certainly its results live with us today.

On 19 March 1968, in the waning days of the Tet offensive period, Radio Hanoi broadcast a long analysis of the offensive's political impact in the United States. This broadcast occurred three days after Robert Kennedy announced his candidacy for the Presidency on a platform to end America's involvement in Southeast Asia. The North Vietnamese broadcast domestically, in relevant part:

> In the military field, the Americans have encountered great and insurmountable difficulties. They have encountered even greater difficulties in the political field. Everyone knows that war is a continuation of politics. . .[2]

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[1] Fever, *Karl Marx and the Promethean Complex*, Encounter 31 (Dec. 1968).

[2] Hanoi Domestic Service, *Having Suffered Mortal Blows, the United States Cannot Stand Up* (in the Vietnamese language) (1400 hrs. G.M.T., 19 Mar. 1968). This observation comes from the writings of General Carl von Clausewitz:

If one accepts as historical facts, first, that the United States Government suffered a serious political setback as a result of the offensive, and, second, that the enemy suffered a serious military defeat which would require two years from which to recover, then how are these facts to be reconciled? Truth always makes its way in the marketplace of ideas. Or does it?

The performance of the American and western press in the Vietnam War is one of the most controversial issues arising from that war. Historical resolution of this issue will require years of multidisciplinary research and study. Fortunately, some work has been done which is worthwhile for the judge advocate to read now.

Peter Braestrup was chief of the Saigon bureau of the *Washington Post* during the Tet offensive. He has written a description and analysis of the news media coverage during that period. The original study comprises two volumes and costs a hefty $45.00. Fortunately, the study has been abridged and was published in paperback. Its cost is a mere $8.95. The abridged version is the subject of this review.

Braestrup's credentials for a study of the Tet offensive are impressive. He served in Korea as an officer in the Marine Corps. At various times he has worked for *Time Magazine*, *The Herald Tribune*, and the *New York Times*. He is presently a Fellow at the Woodrow Wilson International Center for Scholars at the Smithsonian Institution, and is editor of the *Wilson Quarterly* there.

> It is clear, consequently, that war is not a mere act of policy but a true political instrument, a continuation of political activity by other means. . . . The political object is the goal, war is the means of reaching it and means can never be considered in isolation from their purpose.

C. von Clausewitz, *On War* c. 1, no. 24 (M. Howard & P. Paret ed. 1976).

It is only logical that the Lao Dong communist party of North Vietnam, being Marxist-Leninists, should subscribe to certain of Von Clausewitz' views. See Lenin's essay, *Socialism and War:*

> 'War is the continuation of politics by other (i.e., violent) means.' This famous dictum was uttered by Clausewitz, one of the profoundest writers on the problems of war. Marxists have always rightly regarded this thesis as the theoretical basis of views on the significance of any war. It is from this viewpoint that Marx and Engels always regarded the various wars.

N. Lenin, The Lenin Anthology 188 (R. Tucker ed. 1975).

The United States waged war in Vietnam without censorship of its own press reports. The decision to do so seemingly was made in ignorance of the experience of the Korean War, when 'ninety percent of the press correspondents are said to have favored setting up mandatory press censorship after a trial period of voluntary restraints had proved unworkable."[3]

The news media in Vietnam had it better in that war then any previous war, according to Braestrup. They had unprecedented access to the battlefield, facilities for rapid transmission of film and copy, reasonable accommodations at the corps press camps, and generally responsive military public information people to assist them. With all these advantages, how did the press perform during the Tet offensive of 1968?

In Braestrup's words, "the media systems literally became 'overloaded' and tilted at Tet."[4] His thesis is as follows:

> Rarely has contemporary crisis journalism turned out, in retrospect, to have veered so widely from reality. Essentially, the dominant themes of the words and film from Vietnam (rebroadcast in commentary, editorials, and much political rhetoric at home) added up to a portrait of defeat for the allies. Historians, on the contrary, have concluded that the Tet offensive resulted in a severe military-political setback for Hanoi in the south. To have portrayed such a setback for one side as a defeat for the other in a major crisis abroad cannot be counted as a triumph for American journalism.[5]

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[3] J. Matthews, Reporting the Wars 198 (1957). President Johnson was to regret the non-censorship decision.

> After dinner that evening when conversation turned inevitably to Vietnam, [President] Johnson remarked that early in the war he should have imposed press censorship, no matter how complex the problems that might be generated. The way it was, he said, the message of America's resolve never got through to Hanoi.

W. Westmoreland, A Soldier Reports 386 (1976). But the press is not completely at fault here. If the message of American resolve fails to get through to an enemy in wartime, the President ultimately bears responsibility.

[4] P. Braestrup, Big Story: How the American Press and Television Reported and Interpreted the Crisis of Tet 1968 in Vietnam and Washington 528 (1978).

[5] *Id.* at 508.

Braestrup reached his conclusions through a careful analysis of the reporting done by the television networks, wire services, correspondents for daily newspapers, and the news magazines, *Time* and *New Week*. Unfortunately, *U.S. News and World Report* was not included in the study. A complete examination of all news organizations would have required a work even larger than that which Braestrup produced, and he felt it necessary to establish limits to keep the labor manageable.[6]

Big Story is organized in chapters discussing the major aspects of the Tet offensive. After an introductory chapter concerning the press corps in Vietnam, its history, and its attitudes and structure at the time of the offensive, the author sets the stage for discussion of the offensive with a chapter devoted to American history of the several years immediately before Tet of 1968. This was the period of the 1967 "progress" campaign of the Johnson Administration. The most noted example of this campaign's efforts was a speech delivered by General William C. Westmoreland to the National Press Club on 21 November 1967. In that speech, General Westmoreland said, "I am absolutely certain that whereas in 1965 the enemy was winning, today he is certainly losing."[7]

After midnight on Tuesday, 30 January (Saigon time) 1968, a nineteen-man Viet Cong sapper group attacked the United States Embassy. The media's coverage of this attack is the subject of the author's third chapter. The manner in which this tactically insignificant incident was reported was an indication of things to come. This bold operation took the journalists and the Administration by surprise; it was literally a psychological punch to America's solar plexus.

The North Vietnamese attack on the Embassy was a logical starting point for Tet. Its symbolic value far outweighed any military value, and revolutions have historically begun with assaults on such symbols.[8] Interestingly, the North Vietnamese did not direct

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[6] *Id.* at xv.
[7] *Id.* at 51.

[8] [T]he [Russian] Winter Palace [in 1917] represented not only objectives of great practical value, but also symbols of power of an old regime. The capture of such symbols of power may have an importance out of all proportion to its practical effect by reason of the psychological repercus-

any of their opening assaults against Vietnam's communications with the outside world.[9] They wanted to insure that their message was received in the United States.

The desired message was that the sapper group actually got into the embassy building and seized a portion of it. In fact, the sapper group never penetrated the Embassy at all. Both the AP and the UPI were to pass over their wire services that this squad had penetrated the Embassy. AP kept this story alive for twelve hours after it was established that the squad had not entered the Embassy. UPI transmitted that the squad had occupied five floors of the Embassy. UPI's story was too late for the east coast dailies, but that of AP was not:

> As a result, in the U.S. eastern morning newspapers, and in most of the country's other morning editions, the impression given by AP was that: (1) the Vietcong had seized the embassy itself and (2) Westmoreland was lying when he said they had not. Moreover, in the initial late broadcast news, the impression was the same.[10]

Unlike the AP, the UPI corrected its previous incorrect transmission as soon as the situation was clarified.

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sions. The capture of the Bastille, for instance, in July 1789, relatively unimportant in itself, symbolized the release of France from a reactionary system. . . . Again during the 1916 Eastern Week Rebellion in Ireland, plans were laid for the capture of Dublin Castle, the centre of government which symbolized more sharply than any other place in Ireland the bitterness of English rule. These plans miscarried, but there can be little doubt that, had the Castle been captured, the effect throughout the length and breadth of Ireland, in raising people to an open support of the Republican cause, would have been tremendous.

K. Chorley, Armies and the Art of Revolution 32, 33 (1973).

[9] Since the Viet Cong did not attack power stations or telephone, telegraph or cable facilities, local and international communications continued to operate normally throughout the night. For once, newsmen could observe a celebrated battle while it was in progress, and send the report around the world without delay.

D. Oberdorfer, Tet 23 (1971).

[10] P. Braestrup, *supra* note 4, at 86.

Braestrup writes concerning the embassy fight:

> [O]ur very preoccupation with the embassy fight that first morning exaggerated that event's importance and psychological effect. We were distracted from more significant battles (notably around Tan Son Nhut, where sappers got onto the runway, then were routed by the fortuitous arrival of U.S. armor). The embassy fight became the whole Tet offensive on T.V. and the newspapers during the offensive's second day. . . [11]

Similar examples could be culled from the later chapters. The performance of the news media in Vietnam, as described by Braestrup, is disturbing.

The remaining chapters discuss the following topics in relation to news coverage: whether Hanoi won a victory or suffered a defeat in Tet of 1968, the North Vietnamese performance, civilian deaths and property damage during the offensive, the performance of the U.S. Forces, the situation at Khe Sanh—a chapter especially worth reading—, the South Vietnamese performance, the effect of the offensive on pacificiation efforts, Westmoreland's request for 206,000 reinforcements, and the effect of reportage on the political debate at home. The thesis of the concluding chapter is that what happened during Tet could happen in another crisis.

The most serious criticism which this reviewer makes against the study is that there is no analysis of the North Vietnamese "dich van" objectives during this period. This term means "action among the enemy." The action contemplated consists of communication in every form, diplomatic and political action, the entire range of words and deeds which are intended to distort, mislead, falsify, and, in the end, fix in the minds of the audience a set of attitudes and beliefs favorable to Hanoi and its ambitions.[12]

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[11] *Id.* at 110.

[12] This much is clear: for nearly fifteen years the Vietnamese communists have fashioned opinions throughout the world which dissolve if subjected to even casual inspection—yet this seldom happened. It created myths which defy elementary logic yet which endure and now threaten to become the orthodoxy of history. It has turned skeptical newsmen credulous, careful scholars indifferent to data, honorable men blind to immorality. No student of Vietnam can deny that the American perception of

What were the enemy's specific dich van objectives in the Tet offensive? How successful was the enemy in achieving these objectives?[13] To what extent, if any, did the western news media support or undercut the enemy's efforts to communicate a false picture to the outside world?[14] These are very significant and as yet unresolved historical questions that await a diligent scholar.

Tantalizing analyses of fragments of the history of the Vietnam war already exist. One major example is the recent revelation in Dennis Warner's book, *Certain Victory–How Hanoi Won the War*, that at lease one individual who during the Korean war worked in support of the North Korean germ warfare propaganda campaign, was still working as part of the North Vietnamese propaganda machine during the 1960's and 1970's.[15] The really big story of

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Vietnam both official and private (and therefore the policies which flowed from that perception) were to some degree consciously and deliberately shaped by the Vietnamese communists' action-among-the-enemy program.

D. Pike, Anatomy of Deception (unpublished manuscript in the possession of Mr. Pike). Douglas Pike is the author of the famous book, The Viet Cong.

[13] The overwhelming opinion in the United States [during the Tet period] particularly in the news I had heard, was so antiwar, antigovernment. Even though it was still coming from Radio Hanoi and the guards, the big change had occurred in the sources. The communists no longer wrote their own English broadcasts, they merely selected from Western news agencies or from prominent individuals who were saying what Radio Hanoi wished to put out.

J. Rowe, Five Years to Freedom 323 (1971). Major James N. Rowe was a prisoner of war in the hands of the North Vietnamese.

[14] From Douglas Pike's extensive files, which he was kind enough to permit the reviewer to use in preparation of this review, came this item:

Premier Pham Van Dong sends message to American people; April 15, 1968. Interview with CBS correspondent, _____, at whose suggestion he addressed the following message (in part) to the American people through CBS: "The Vietnamese and American peoples now have a common objective. Let us struggle hard together for an end to the war of aggression in Vietnam and to force the U.S. government to bring its troops home. This will be a victory of the friendship of our two peoples. Through the medium of CBS, the Vietnamese people convey their cordial greetings to the great American people who valiantly fought a colonial war to defend their national right, and have set an example for all the peoples of the world."

Whether this statement was ever broadcast or published in the United States, the reviewer does not know.

[15] D. Warner, Certain Victory—How Hanoi Won the War 183 (1977).

North Vietnamese efforts to influence American public opinion remains to be told.

History periodically goes through phases of revisionism. It is natural enough that different generations should view the same events differently. To some extent, *Big Story* is an early revisionist history of the Vietnam war. The book questions the behavior of America's most powerful business corporations—the United States news media—during the Tet crisis.[16] But such revisionism is inevitable. Mr. Douglas Pike, author of *The Viet Cong*, states:

> There is going to be a period of historical revisionism concerning the war in Vietnam. It is inevitable and when it comes historians are going to ask how in the world could these people believe this stuff.[17]

Of what value is this book to the judge advocate in the post-Vietnam era? Seemingly, we are preparing to fight the next war without censorship. The Army Field Press censorship units have been demobilized.[18] The problems the Army will have with the news media in the next war will be similar to those experienced in Vietnam. There will be news embargoes broken, military operations revealed before they jump off, security information that could save the lives of our soldiers revealed as news. These things are to be expected. They are not new to our history.[19] They are the products

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[16] And questions should be asked about conduct such as this:

> In late 1968, according to Edward J. Epstein, an NBC field producer named Jack Fern suggested to Robert J. Northshield a three-part series showing that Tet had indeed been a military victory for America and that the media had exaggerated greatly the view that it was a defeat for South Vietnam. The idea was rejected because Northshield (an NBC News producer) said later, Tet was already established "in the public's mind as a defeat, and therefore it was an American defeat."

P. Braestrup, *supra* note 4, at 509.

[17] Interview with Douglas Pike, author of The Viet Cong.

[18] If we have to fight the Warsaw Pact, this decision will mean that the United States and her allies cannot insure the security of their operations. Our strategy may necessarily become one of attrition of a numerically superior foe.

[19] On 7 June 1942, while the Battle of Midway was still in progress, *The Chicago Tribune* and later the New York *Daily News* and the Washington *Times-Herald* published articles which, if read carefully, indicated clearly that the Japanese

of intensely competitive business organizations that sell news. This competitive business pressure occasionally distorts the nation's wartime mission requirements. It might be considered the ultimate contradiction of our economic system. In an example full of symbolism, Braestrup relates that, at Hue, he had to physically restrain a television correspondent with a bag of film who was rushing aboard a helicopter ahead of a wounded marine.[20] The news must move before the wounded!

What does a staff judge advocate in a war zone advise a division or corps commander to do when a news media representative releases the operational details before the operation occurs? Does he recommend prosecution under article 104 or 106 of the Uniform Code of Military Justice?[21] What about the jurisdictional problem, to say nothing of the political and constitutional difficulties presented? What if Congress has not yet declared war? What administrative action is to be taken, if any? These are just a few of the possible problems a staff judge advocate can expect to see. There will be no easy answers or decisions, and those poor, bedeviled public information officers will need all the help they can get.

Braestrup's work, by looking so intensely at one brief period of the recent past, has given readers an opportunity to consider the

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naval code had been compromised. The article had been written by a *Tribune* correspondent who happened to pass through the captain's cabin on the U.S.S. New Orleans where he saw a message that became the basis for the story. This correspondent had not been asked to sign accreditation papers as a war correspondent and was thus free from submitting what he wrote to a censor.

Unbelieveably, the Japanese spies were asleep. Whatever changes, if any, that were made to their codes after publication of these articles, were not a problem for United States code breakers. G. Sanger, *Freedom of the Press or Treason?* 103 U.S. Nav. Inst. Proc. 895 (1977).

[20] P. Braestrup, *supra* note 4, at 235.

[21] Unlike the situation which prevailed in the Vietnam era, World War II correspondents believed they could be tried before a court martial for violations of the law.

> But even though we had civilian status, we were subject to certain military disciplines once we were accredited by the War Department as correspondents. We were subject to court-martial for any violation of law; and we could be banished summarily from a theater of operations and sent home in disgrace for any serious breach of trust.

Whitehead, *A Correspondent's View of D-Day*, D-Day, The Normandy Invasion in Retrospect 43 (1971).

problems with the media to be faced in the next war. These problems will be especially great if noncensorship is the President's policy. The memory of our fallen comrades requires that we try to deal with these problems now.[22]

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[22] The argument over American military "defeat" misses the essential point. The North Vietnamese were not fighting the United States Army. They were fighting the United States. When an American army officer, in Hanoi on the eve of Saigon's fall, reminded his North Vietnamese counterpart that "You must remember, you never defeated the United States Army on the field of battle," the North Vietnamese reply was, "That may be true, but it is also irrelevant."

Weyand & Summers, *Vietnam Myths and American Realities*, Dep't of the Army Pamphlet No. 360-828 (July-Aug. 1976). What made our military activities irrelevant? The fact that the ideas that motivated our actions were destroyed. This is the story of the Vietnam War.

ABSTRACTS OF RECENT GRADUATE (ADVANCES) CLASS THESES

I. INTRODUCTION

The Judge Advocate General's School at Charlottesville, Virginia, offers a nine-month course of instruction for career judge advocates. Among its subcourse options, the course offers students the opportunity to write a thesis, for credit, on a topic of military law. Such theses are fifty or more pages in length. Many have been published in the *Military Law Review*. Indeed, the *Review* was established in 1958 partly to provide a medium through which the best of these theses could be disseminated to the military legal community.

However, it has not been possible for the *Review* to publish all theses produced over the years. Among these are some which could be very useful if judge advocates and civilian attorneys in field legal offices knew of their existence.

To fill this need, the Catalog of Advanced (Career) Class Theses was published in 1971. This looseleaf volume contains abstracts, or summaries, of all theses written during the first nineteen career or advanced courses at the JAG School. Annual supplements to this catalog were issued in 1972, 1973, 1974, and 1975. Beginning with the academic year 1976-77, the writing of theses, which for a number of years had been mandatory, was made optional for the students. The 1977 supplement to the thesis catalog contained abstracts of the theses produced by the 24th Advanced Class, 1975-76, and of the two theses produced by the 25th Advanced Class, 1976-77.

Three theses were written by members of the 26th Advanced Class during academic year 1977-78, and two more by members of the 27th Graduate Class, 1978-79. These five theses have not been summarized in any supplement to the thesis catalog. Accordingly, they are summarized below.

Publication of summaries does not mean that the theses summarized will never be published in the *Military Law Review*. On the

contrary, it is hoped that all or most of them will eventually be published. Rather, these summaries are published as a service to our readers who may want to make use of the theses earlier than they can be published.

A word on terminology: The nine-month course for career judge advocates was first offered during academic year 1951-52. Through its fourteenth offering in academic year 1965-66, it was called the Career Course. Thereafter the name of the program was changed to, Judge Advocate Officer *Advanced* Course. This designation was used through the 26th Advanced Course, given during academic year 1977-78. Beginning with the next year, the course became known as the Judge Advocate Officer *Graduate* Course.

Theses are available for use at the library of The Judge Advocate General's School, but cannot be removed therefrom. Copies of most theses are also available at the library of the University of Virginia School of Law. Loan copies may be obtained for temporary use by writing to: Interlibrary Loan, Law Library, University of Virginia, Charlottesville, Virginia 22901.

II. THESIS ABSTRACTS

1. Charoonbara, Suthee, Major, *The Organization of Military Courts in Thailand*, an unpublished thesis prepared during the 27th Judge Advocate Officer Graduate Course. Charlottesville, Virginia: The Judge Advocate General's School, U.S. Army, 1979. Pp. 43.

This thesis describes the military courts of the Kingdom of Thailand, their structure, jurisdiction, and powers. The thesis updates two articles on the subject previously published in the *Military Law Review* at 14 Mil. L. Rev. 171 (1961), and at 64 Mil. L. Rev. 151 (1974).

The thesis discusses military trial and appellate courts, and differences in their organization between peacetime and wartime. Effects of proclamation of martial law, and relations between military and civilian courts are also considered.

Criminal procedure is briefly examined, with emphasis on factfinding, the right to counsel, and the opportunity for appeal. Sentencing and punishment are also covered.

The thesis concludes with an analysis of Thailand's military judicial system. Comparison is made with the civilian judicial system. The status of military courts as part of the judiciary and the independence of military judges are discussed. The author concludes that the military justice system should be modified to include a right to appeal to, and powers of review in, Thailand's civilian supreme court.

The author, Major Charoonbara, received his LL.B. from Chulalongkorm University in Thailand in 1964, and his LL.M. from Southern Methodist University in Texas in 1967. In 1970 he completed the Judge Advocate Officer Basic Course at the JAG School, Charlottesville, Virginia. Before coming to the Graduate Course, he held various positions within the Judge Advocate General's Department of the Ministry of Defense in Thailand.

2. Lopombo, Munza, Captain, *Analysis of the Needs of the Republic of Zaire Concerning the Implementation and Dissemination Required by the Law of War Under the Hague and Geneva Conventions*, an unpublished thesis prepared during the 26th Judge Advocate Officer Advanced Course. Charlottesville, Virginia: The Judge Advocate General's School, U.S. Army, 1978. Pp. iii, 87.

This thesis discusses the legal basis for law-of-war instruction conducted within the Zairian Armed Forces. The paper opens with a short account of the geography, history, and ethnology of the Republic of Zaire, followed by a general discussion of the relationship between war and law.

The main body of the thesis consists of a review of the various Hague and Geneva conventions which comprise the law of war in modern times. Primary emphasis is placed upon the several Geneva conventions of 1949, with some mention of the proposed protocols completed in 1977. This survey of the content of the law of war is followed by a specific discussion of the requirements for law-of-war instruction imposed by the conventions upon signatory states.

Finally, the thesis reviews various types or methods of instruction, together with the purposes of and need for each of them. Various relevant provisions of the Zairian Code of Military Justice are reviewed. The author concludes with a recommendation for more training, including practical field training, in the law of war.

Captain Munza is a member of the Military Justice Corps of the Armed Forces of the Republic of Zaire. He is a 1974 graduate of the University of Zaire, Kinshasa, and served as a military auditor, or investigator-prosecutor, before coming to the Advanced Course.

3. Luedtke, Paul L., Major, *Open Government and Military Justice: An Analysis of the Impact of the Privacy Act and the Freedom of Information Act on the Military Justice System*, an unpublished thesis prepared during the 26th Judge Advocate Officer Advanced Course. Charlottesville, Virginia: The Judge Advocate General's School, U.S. Army, 1978, Pp. 82.

This thesis reviews briefly the major features of the Privacy Act of 1974 and the Freedom of Information Act, and the interrelationship between them. Within this broad era, attention is focussed on the effect of the two acts on release of records of trial and of nonjudicial punishment under Article 15, Uniform Code of Military Justice.

The thesis considers such problems as whether and under what conditions such records may be released to the public; whether appellate determinations must be indexed and made available to the public; and the possibility of amending military justice records pursuant to the Privacy Act.

The author moves on to examine the effects of the two acts on availability of other types of records, not produced through operation of the military justice system, but subject to discovery for use in trials by court-martial and possibly also administrative board proceedings. In this second area, the thesis examines the possibility that openness-in-government legislation may be an alternative to normal discovery procedures.

Also discussed is the possibility that failure of government to publish punitive regulations in the Federal Register may create a defense against charges of violation of those regulations under Article 92, Uniform Code of Military Justice.

The thesis suggests that sufficient guidance exists to enable the judge advocate to decide whether records of trial and of nonjudicial punishment should be released. However, resolution of issues raised in the discovery area is said to be speculative and uncertain.

The author concludes by recommending that the Army implement more liberally the publication and indexing requirements of the Freedom of Information Act for records in the military justice system. This, he argues, would be a means of preventing unnecessary litigation and otherwise promoting the purposes of the Act.

Major Luedtke is a 1970 graduate of the University of Minnesota Law School. He completed the Judge Advocate Officer Basic Course at the JAG School in 1972, and served in a variety of military justice assignments at the U.S. Army Engineer Center, Fort Belvoir, Virginia. Before coming to the Advanced Course, Major Luedtke was assigned to the Administrative Law Division, Office of The Judge Advocate General, at the Pentagon, from 1975 to 1977. He is now officer-in-charge at the branch office, Hunter Army Airfield, Georgia, of the Office of the Staff Judge Advocate, 24th Infantry Division and Fort Stewart, in Georgia.

4. Monga Lisangi Mangbau, Captain, *A Critical Analysis of the Military System of Justice in the Republic of Zaire*, an unpublished thesis prepared during the 26th Judge Advocate Officer Advanced Course. Charlottesville, Virginia: The Judge Advocate General's School, U.S. Army, 1978. Pp. ii, 65.

This thesis provides an overview of the substantive and procedural law and the judicial and administrative organization which comprise the military justice system of the Republic of Zaire.

The paper opens with a brief description of the political and legal history of Zaire in modern times. This historical sketch begins with the former Belgian Congo, and continues with an account of the early days of independence and the Katanga secession.

The main body of the paper is divided into two parts. The first of these focuses on courts-martial. These are of several types and correspond roughly with American summary, special, and general courtsmartial. Their functions and jurisdiction are described, and their personnel are identified. Mention is made of the procedural and substantive law applicable in court-martial proceedings.

The second part of the main body of the paper deals with the military auditorat, which is the organization for investigation and prosecution of military offenses. This system is similar to that of the

examining magistracy found in European civil law systems of justice, except for the combination of the investigative and prosecutorial functions found in the Zairian system. Mention is made of the military judicial police, who are an arm of the auditorat.

The paper closes with recommendations for improvement of the military justice system, including increased military legal education, elimination of regional prejudices among those administering the system, reduction of command influence, and establishment of a defense counsel corps.

Captain Mangbau is a member of the Military Justice Corps of the Armed Forces of the Republic of Zaire. He is a 1973 graduate of the University of Zaire, Kinshasa. Captain Mangbau served as a military auditor, or investigator-prosecutor, from 1973 to 1976.

5. Schinasi, Lee D., Captain, *Special Findings: Their Use at Trial and On Appeal*, an unpublished thesis prepared during the 27th Judge Advocate Officer Graduate Course. Charlottesville, Virginia: The Judge Advocate General's School, U.S. Army, 1979. Pp. 58.

This thesis discusses practice and procedure concerning determinations of law and findings of fact in criminal trials. Specifically, Rule 23(c) of the Federal Rules of Criminal Procedure is compared with Article 51(d) of the Uniform Code of Military Justice.

The development and implementation of Rule 23(c) in the federal civilian system are considered. Tactical considerations in requesting special findings, and the obligation of courts to render such findings, are discussed. Treatment of special findings on appeal, allegations of error in special findings, and appellate remedies are examined.

Turning to the military equivalent, Article 51(d), U.C.M.J., the author reviews the text of this provision and the implementing language at paragraph 74*i* of the Manual for Courts-Martial, United States, 1969 (Rev. ed.). He discusses tactical considerations in the court-martial setting, and the obligation of courts-martial to issue special findings. There follows an examination of the manner in which errors in special findings are handled within the military appellate system. The statutory and judicial bases for consideration by appellate courts, waiver of errors, and appellate remedies for defective findings are all dealt with.

The author recommends that trial litigators make more use of special findings in courts-martial, because such practice is a simple yet effective way to influence the outcome of a trial. He notes that the various service courts of military review have diverged in their interpretation and application of Article 51(d), U.C.M.J. The author feels that the Court of Military Appeals should take steps to eliminate such divergence. Increased use of special findings, he believes, would lead to such a result.

The author, Captain Schinasi, received his undergraduate and law degrees at the University of Toledo in Ohio. He completed the Judge Advocate Officer Basic Course at the JAG School in 1972. At Fort Bliss, Texas, from 1972 to 1975, he served as trial counsel and as chief defense counsel. Prior to coming to the Graduate Course at the JAG School, he served as a branch chief in the Government Appellate Division of the U.S. Army Legal Services Agency, Falls Church, Virginia, from 1975 to 1978. After completing the Graduate Course in 1979, he was assigned as an instructor in the Criminal Law Division at the JAG School.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, tapes, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Military Law Review*.

Notes are set forth in Section IV, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section II, Authors or Editors of Publications Noted, and in Section III, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding note in Section IV. For books having more than one principal author or editor, all authors and editors are listed in Section II.

The opinions and conclusions expressed in the notes in Section IV are those of the editor of the *Military Law Review*. They do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

II. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

Douthwaite, Graham, and Mary Moers Wening, *Unmarried Couples and the Law* (No. 1).

Flesch, Rudolf, *Look It Up, A Deskbook of American Spelling and Style* (No. 2).

Henn, Harry G., *Copright Primer* (No. 3).

Kasaian, John J., and Douglas B. Oliver, *The Pocket Dictionary of Legal Words* (No. 4).

Lewis, James B., *The Estate Tax* (No. 5).

McLaughlin, Joseph M., *Practical Trial Evidence* (No. 6).

Mountbatten, Earl, *Speech on the Occasion of the Award of the Louise Weiss Foundation Prize to SIPRI at Strasbourg on the 11th May 1979* (No. 7).

Oliver, Douglas B., and John J. Kasaian, *The Pocket Dictionary of Legal Words* (No. 4).

Peers, W. R., *The My Lai Inquiry* (No. 8).

Prentice-Hall, Inc., *Complete Internal Revenue Code of 1954* (No. 9).

Prentice-Hall, Inc., *Federal Tax Handbook 1979* (No. 10).

Scalf, Robert A., editor, *Defense Law Journal* (No. 11).

Wenig, Mary Moers, and Graham Douthwaite, *Unmarried Couples and the Law* (No. 1).

Whelan, John W., editor, volume 15, *Yearbook of Procurement Articles* (No. 12).

Whisker, James B., *The Citizen Soldier and United States Military Policy* (No. 13).

III. TITLES NOTED

Citizen Soldier and United States Military Policy, *by James B. Whisker* (No. 13).

Complete Internal Revenue Code of 1954, *by Prentice-Hall, Inc.* (No. 9).

Copyright Primer, *by Harry G. Henn* (No. 3).

Defense Law Journal, *edited by Robert A. Scalf* (No. 11).

Estate Tax, *by James B. Lewis* (No. 5).

Federal Tax Handbook 1979, *by Prentice-Hall, Inc.* (No. 10).

Look It Up, A Deskbook of American Spelling and Style, *by Rudolf Flesch* (No. 2).

My Lai Inquiry, *by W. R. Peers* (No. 8).

Pocket Dictionary of Legal Words, *by John J. Kasaian and Douglas B. Oliver* (No. 4).

Practical Trial Evidence, *by Joseph M. McLaughlin* (No. 6).

Speech on the Occasion of the Award of the Louise Weiss Foundation Prize to SIPRI at Strasbourg on the 11th May 1979, *by Earl Mountbatten* (No. 7).

Unmarried Couples and the Law, *by Graham Douthwaite and Mary Moers Wenig* (No. 1).

Yearbook of Procurement Articles, volume 15, *edited by John W. Whalen* (No. 12).

IV. PUBLICATIONS NOTED

1. Douthwaite, Graham, and Mary Moers Wenig, *Unmarried Couples and the Law*. Indianapolis, Indiana: The Allen Smith Company, Publishers, 1979. Pp. ix, 696. Cost: $25.00.

The practice of men and women living together outside marriage has become commonplace. In recent years, a considerable body of law has grown up to regulate such non-marital relationships. Previously, such relationships enjoyed no legal recognition except in the narrowly limited and now largely obsolete concept of common-law marriage. This book seeks to pull together the many strands of the modern law on the subject.

The book is organized into six chapters, supplemented by three appendices. The opening chapter provides a brief summary of traditional marriage law, and some comparison with non-marital lifestyles. Chapter 2, "Ramifications of the Unmarried Status," deals with a wide range of topics, such as employment difficulties, unmarried pregnancies in the armed forces, the right of privacy, homestead laws, welfare and unemployment benefits, insurance problems of various sorts, abortion and contraception, liability to third persons in contract and tort cases, homosexual partnerships, and several other topics.

The third chapter considers the status, rights, and disabilities of children born of non-marital relationships. Chapter 4, "Rights to Accumulated Property and Value of Services Rendered During Cohabitation," deals with concepts of partnership and joint venture, agreements to pool earnings, implied-in-fact contracts, quasi-contracts, resulting trusts, constructive trusts, and other related topics.

The fifth chapter, "Marital Status and Taxes," compares the effects of tax laws on both married and unmarried cohabitants. Discussed in this context are income, gift, estate, and social security taxes, together with tax-saving arrangements which may or may not be available to unmarried couples. This chapter is the portion of the book which was written by Co-author Mary M. Wenig.

Chapter 6, "State-by-State Commentary," comprises about half the entire book. Discussion of each state's law opens with a review of that state's position on common law marriage. (Most states have abolished it by statute.) This is followed by a topic-by-topic summary of the law of the state. Topic headings used include adoption, abortion, property rights of cohabitants, possible criminal liability, welfare assistance, workers' compensation death benefits, and others.

The three appendices all deal with the case of Marvin v. Marvin, in which Michelle Marvin sued Actor Lee Marvin for various benefits of divorce, although they had never married. Appendix A reproduces the plaintiff's complaint, and the other two appendices set forth the opinions of the California courts which considered the case.

For the convenience of the reader, the book offers a table of contents and a subject-matter index. The text is divided into numbered sections, with many headings and subheadings.

Graham Douthwaite is a professor at the University of Santa Clara School of Law. Mary Moers Wenig, author of chapter 5, is a professor at the University of Bridgeport School of Law, and a visiting fellow in law at the Yale Law School.

2. Flesch, Rudolf, *Look It Up, A Deskbook of American Spelling and Style.* New York, N.Y.: Harper & Row, Publishers, Inc., 1977. Pp. x, 431. Cost: $9.95.

This compact volume lists some 18,000 words which are commonly spelled, capitalized, punctuated, or otherwise used incorrectly. It is not a dictionary, and it provides definitions only where needed to distinguish between words of similar spelling and different meaning. Unlike *Webster's Legal Speller*, which was briefly noted at 82 Mil. L. Rev. 223 (1979), *Look It Up*, with fewer listings, is general in its subject-matter coverage. In preparing this book, the author consulted various other style manuals and dictionaries.

Entries are listed alphabetically in bold-face type. Each entry is followed by one or more rules of usage, stated informally as do's and don't's. Most entries are one or two lines in length, but a few fill up to a half page, and the entry "address" is followed by three pages of instructions on how to address the President, governors, judges, bishops, and other dignitaries.

The book opens with a short introductory essay, "Please Read This First," setting forth the author's theory, and describing the manner in which the entries were constructed.

Rudolf Flesch has written a number of other books on writing, public speaking, and related topics.

3. Henn, Harry G., *Copyright Primer.* New York, N.Y.: Practicing Law Institute, 1979. Pp. xxviii, 786.

Federal copyright law, which appears in Title 17 of the United States Code (1976), was extensively revised by act of Congress in 1976. This book provides information about these changes and some of the recent experience under them. It replaces a 1965 text, *Copyrights*, which was written by Barbara A. Ringer, Register of Copyrights.

The Henn book is organized into thirty-one chapters and ten appendices. After an introduction and a review of pre-1978 law, the author plunges into an extensive consideration of present law. There are chapters on the subject matter of copyright, works eligible for copyright, execution of transfers of copyrights, recordation of documents, and copyright notice, among other subjects. Also covered are duration, renewal, and termination of copyrights, scope of protection, fair use, and related matters. Exempted matter, licensing for coin-operated phonograph record players, broadcasting, and cable television transmission are also dealt with. Chapters on infringement, remedies, and restrictions on importation are included. The book closes with chapters describing the Copyright Office, its structure, functions, and related agencies.

The ten appendices set forth the text of the old and new copyright laws, as well as rules, regulations, forms, and certain circulars of the Copyright Office and related agencies. There are bibliographies of studies, reports, bills, and hearings on copyright revision. One appendix contains excerpts from congressional committee reports and guidelines. The final appendix is a general bibliography.

In addition to the appendices, the book offers a preface, table of chapters, detailed table of contents, and a subject-matter index with numerous headings and subheadings. The text is also divided into many sections and subsections by lettered and numbered headings and subheadings.

The author, Harry G. Henn, is a professor of law at Cornell University, Ithaca, New York, where he teaches copyright law and related subjects. He has been an active practitioner of copyright law and has participated extensively in copyright law reform efforts.

4. Kasaian, John J., and Douglas B. Oliver, *The Pocket Dictionary of Legal Words*. Garden City, N.Y.: Dolphin/Doubleday & Company, Inc., 1979. Pp. xii, 180. Cost: $2.95. Paperback.

This book provides definitions of approximately 2,500 words commonly used in a legal context. Entries range for *A.B.A.* to *zoning*. Most of the definitions are one, two, or three lines in length. No pronunciations or derivations are given. Many Latin phrases are included.

The book is supplemented by two short appendices. Appendix A, "Common-law Crimes," lists the names of dozens of offenses against the English common law, sorted out by type of crime, such as, "Crimes against Property," "Crimes against Person," and so forth. Appendix B consists of columnar tables of Latin and Green prefixes and suffixes, for use in locating words similar to other words in root. These tables consist of three columns. The first column lists prefixes or suffixes; the second, meanings; and the third, examples of complete words which include the prefix or suffix in question.

John J. Kasaian is the author of this dictionary, and Douglas B. Oliver, J.D., is its editor.

5. Lewis, James B., *The Estate Tax*, 4th edition. New York, N.Y.: Practicing Law Institute, 1979. Pp. xxviii, 772.

This book reviews federal estate tax law, including the changes effected by the Tax Reform Act of 1976 and other legislation. The book replaces the third edition which was published in 1964. Previous editions were published in 1957 and 1960.

The book is organized in twenty-five chapters. It opens with an overview of estate tax law, and a discussion of miscellaneous topics such as the effects of state law. Chapters follow which consider the concept of gross estate, marital interests such as dower and curtesy, transfers of property made within three years of death, and other incomplete transfers necessitating inclusion of property in an estate for tax purposes. Also discussed are contractual annuities, joint interests with right of survivorship, and powers of appointment. Included as well are life insurance, various types of deductions from the gross estate, tax computation, tax credits, valuation of property, tax returns, various aspects of tax collection proce-

dure, and estates of nonresident aliens. The book closes with a chapter on the history of federal estate taxation in the United States.

For the convenience of the reader, this book offers a table of chapters, a detailed table of contents, and a table of authorities cited, including cases, statutes, revenue procedures and rulings, and treasury regulations. The book closes with a subject-matter index.

The author, James B. Lewis, is a partner in the firm of Paul, Weiss, Rifkind, Wharton & Garrison, of New York City. He is also an adjunct professor of law at the New York University School of Law. He was employed by the Treasury Department from 1931 through 1953 in various posts in the Internal Revenue Service and other offices.

6. McLaughlin, Joseph M., *Practical Trial Evidence.* New York, N.Y.: Practicing Law Institute, 1977. Pp. xiv, 178. Paperback Supplement, *Federal Rules of Evidence.* Pp. x, 38. Paperback.

This book is a transcript of a series of lectures and courtroom demonstrations originally presented by the publishers on videotape. The book, called by the publisher a "video handbook," is intended to be used by viewers of the videotape series.

The book is organized into eight chapters, one for each tape in the videotape series. The first chapter, "Tape Number One," introduces the series and provides a discussion of competence of witnessess, examination of witnesses, and the lay opinion rule. The second chapter considers expert testimony, its uses and pitfalls. Chapters 3 and 4, designated "Tape Number Three" and "Tape Number Four," deal with hearsay and with exceptions to the hearsay rule, respectively. The fifth chapter focuses on use of documents and writings, including authentication of writings and the best evidence rule. The sixth considers circumstantial evidence; the seventh, conduct of a trial, including objections, protecting the record, and handling of real or demonstrative evidence; and the eighth, judicial notice, presumptions, inferences and privileges.

Sprinkled throughout the book are "demonstrations," which are courtroom scenarios on the videotapes. These scripts are examples of trial techniques.

The supplement to the main book is a reprint of the Rules of Evidence for United States Courts and Magistrates, or Federal Rules of Evidence, enacted by Congress in 1975. The text of the rules is presented without commentary. The main book contains many references to the rules, but very few quotations; hence this supplement.

Both the main book and the supplement offer detailed tables of contents for the convenience of the reader.

The author, Joseph M. McLaughlin, is a dean and professor of law at Fordham University School of Law, in New York. He has published many other writings on legal subjects.

7. Mountbatten, Earl, *Speech on the Occasion of the Award of the Louise Weiss Foundation Prize to SIPRI at Strasbourg on the 11th May 1979.* Stockholm, Sweden: Stockholm International Peace Research Institute, 1979. Pp. 16. Unbound.

In this speech, Lord Mountbatten, who served as Supreme Allied Commander in South East Asia during the Second World War, deplores the continuing arms race and the proliferation of nuclear weapons. He argues, from his half-century of military experience, that use of nuclear weapons of any type is sure to involve escalation toward total destruction. He urges a return to reliance on conventional weapons, as a course of action more likely to promote international peace.

The Stockholm International Peace Research Institute is an organization financed by appropriations of the Swedish parliament. Its purposes are to collect information about weapons development and procurement by governments worldwide, and to disseminate this information to as wide a readership as possible, in the hope of influencing public policy in favor of disarmament.

The speech is reproduced in both English and French, and is distributed in a cardboard folder.

8. Peers, W. R., *The My Lai Inquiry.* New York, N.Y.: W. W. Norton & Company, 1979. Pp. xii, 306. Cost: $12.95.

In this work, Lieutenant General Peers tells the story of his ex-

tensive formal investigation of the infamous My Lai massacre of 16 March 1968. Specifically, General Peers relates that he was tasked to inquire into all the preliminary investigative efforts, to discover whether there were any attempts to cover up the details of the massacre. This quickly grew into a very large project requiring the services of many experts.

The twenty-two chapters are organized into three major parts,"The Preliminaries," "The Inquiry," and "The Aftermath." Although the task of the inquiry team was narrowly defined, in the end the entire My Lai incident was encompassed. Evidence of attempts to conceal the facts, or at least of failure to follow up factual leads, was found. General Peers expressed surprise at the dismissal of charges in case after case, and he questions whether there is some flaw in our system of justice, both military and civilian.

The book is liberally supplemented by appendices. These include reprints of regulations and pocket cards in effect at the time of the My Lai incident; reports; memoranda; letters relevant to the early investigative efforts; and other documents and information summaries. There is some use of pictures and charts in the text.

Lieutenant General Peers served as commander of the 4th Infantry Division in Vietnam, and later as deputy commander of the 8th Army in Korea. He retired in 1973 after thirty-six years of service in the Army.

9. Prentice-Hall, Inc., *Complete Internal Revenue Code of 1954*. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1979. Pp. 2,977. Cost: $10.00, paperback.

This book is republished every year to make available the previous year's amendments to the Internal Revenue Code. It is a companion to the Prentice-Hall *Federal Tax Handbook*, also republished annually.

The book reproduces the Internal Revenue Code, with annotations explaining the numerous amendments enacted over the years. The book's organization is, therefore, that of the code itself, beginning with income taxes, estate and gift taxes, and employment taxes, proceeding through miscellaneous excise taxes and alcohol, tobacco, and certain other excise taxes, and closing with procedure

and administration, provisions concerning the Joint Committee on Taxation, and financing of Presidential election campaigns.

The book opens with four pages of information about tax rates and where to find them. This is followed by a detailed table of contents, listing all subtitles, chapters, subchapters, parts, and subparts by name and section number. The book closes with a cross-reference table comparing the 1939 and 1954 codes, and an extensive subject-matter index. Pagination of the code begins with page 25,000.

10. Prentice-Hall, Inc., *Federal Tax Handbook 1979.* Englewood Clifs, N.J.: Prentice-Hall, Inc., 1979. Pp. 635. Paperback.

This annual publication is a companion volume for the Prentice-Hall *Complete Internal Revenue Code of 1954*, also republished annually to reflect the previous year's amendments.

There are two introductory sections. "Round-Up of Revenue Act of 1978" is an analysis of the year's changes in federal tax law. "Tax Due Dates, Charts and Tables" sets forth information about tax rates, methods of computation, and related matters.

The body of the book is organized into twenty-seven chapters, with consecutively numbered sections. The opening chapters deal with exemptions, gross income, gains and losses, and dividends. Several chapters in the middle cover the various types of deductions. The closing chapters deal with miscellaneous topics, such as inventory, accounting, partnerships, estates and trusts, and foreign income, among other topics. There are also several chapters on taxation of corporations.

The book provides a short table of contents, and a detailed subject-matter index.

11. Scalf, Robert A., editor, *Defense Law Journal.* Indianapolis, Indiana: The Allen Smith Company, 1979. Five current service issues, bound volume, and index volume, described below. Cost: $45.00 for one-year subscription.

This publication provides information on current developments in tort law and litigation. It is published in the form of five current service issues annually. At the end of each year, these issues are collected in one bound volume with an index.

Volume 27, concerning developments in 1977, was briefly noted at 82 *Mil. L. Rev.* 222 (1978). A cumulative index volume, covering volumes 18 through 27 and certain writings in earlier volumes, was noted at 83 *Mil. L. Rev.* 186 (1979).

The current annual subscription price is $45.00. This includes five current service issues and the bound volume into which they are compiled. On a one-time basis, a copy of the cumulative index volume mentioned above is provided at no extra charge.

12. Whelan, John W., editor, volume 15, *Yearbook of Procurement Articles*. Washington, D.C.: Federal Publications, Inc., 1979. Pp. xvi, 1424.

This annual volume is a collection of seventy articles on federal government procurement and contract law. They have been reprinted from various law reviews and journals. All were originally published in 1977 or 1978; one article dates from 1976. Included are reprints of three articles published in volume 80 of the *Military Law Review*.

A complete description of volume 15 will be provided in "Publications Received and Briefly Noted" in volume 86 of the *Military Law Review*. That volume will be a contract law symposium issue, like volume 80.

13. Whisker, James B., *The Citizen Soldier and United States Military Policy*. Croton-on-Hudson, N.Y.: North River Press, Inc., 1979. Pp. x, 110. Cost: $7.50, hard cover; $4.50, paperback.

In this small book the author reviews the history of governmental and non-governmental efforts within the United States and other countries to encourage private citizens to develop skill in the use of rifles. Emphasis is placed on training within militia-type units.

The first half of the book is an introduction organized into five chapters. These provide an overview of European and American militia, Soviet militia, militia within fascist governments and movements, civilian marksmanship programs in the United States during the past twelve years, and the author's conclusions.

The second half, the heart of the book, is a reprint of a report to Department of the Army entitled "A Study of the Activities and Missions of the NBPRP." The National Board for the Promotion of Rifle Practice is a federal agency created by act of Congress in 1903. Through its implementing arm, the Office of the Director of Civilian Marksmanship, it tries to promote rifle training among civilians. The reprinted report on its activities and effectiveness was prepared in 1966 by the civilian management research firm, Arthur D. Little, Incorporated, under contract with the Army.

The author of the book, basing his conclusions on the Arthur D. Little Report, argues that civilian rifle training in militia-type organizations is not obsolete, and is of value to the Army in wartime. Soldiers who have had such training become marksmen much more quickly and easily than those who have not. The Soviets and others have established militia-training programs much more extensive than any equivalent program in the United States. In consideration of these facts, the author feels that greater emphasis should be placed on civilian rifle training in the United States.

The book has a table of contents and preface, a section containing footnotes to the long introduction, and a bibliography.

The author, James B. Whisker, is an associate professor of political science at the West Virginia University, Morgantown, West Virginia. He has published other writings on gun control, political science, and history.

INDEX FOR VOLUME 85

I. INTRODUCTION

This index follows the format of the vicennial cumulative index which was published as volume 81 of the *Military Law Review*. That index was continued in volume 82. Future volumes will contain similar one-volume indices. From time to time the material of volume indices will be collected together in cumulative indices covering several volumes.

The purpose of these one-volume indices is threefold. First, the subject-matter headings under which writings are classifiable are identified. Readers can then easily go to other one-volume indices in this series, or to the vicennial cumulative index, and discover what else has been published under the same headings. One area of imperfection in the vicennial cumulative index is that some of the indexed writings are not listed under as many different headings as they should be. To avoid this problem it would have been necessary to read every one of the approximately four hundred writings indexed therein. This was a practical impossibility. However, it presents no difficulty as regards new articles, indexed a few at a time as they are published.

Second, new subject-matter headings are easily added, volume by volume, as the need for them arises. An additional area of imperfection in the vicennial cumulative index is that there should be more headings.

Third, the volume indices are a means of starting the collection and organization of the entries which will eventually be used in other cumulative indices in the future. This will save much time and effort in the long term.

This index is organized in five parts, of which this introduction is the first. Part II, below, is a list in alphabetical order of the names of all authors whose writings are published in this volume. Part III, the subject-matter index, is the heart of the entire index. This part opens with a list of subject-matter headings newly added in this volume. It is followed by the listing of articles in alphabetical order

by title under the various subject headings. The subject matter index is followed by part IV, a list of all the writings in this volume in alphabetical order by title.

The fifth and last part of the index is a book review index. The first part of this is an alphabetical list of the names of all authors of the books and other publications which are the subjects of formal book reviews published in this volume. The second part of the book review index is an alphabetical list of all the reviews published herein, by book title, and also by review title when that differs from the book title. Excluded are items appearing in "Publications Received and Briefly Noted," above, which has its own index.

All titles are indexed in alphabetical order by the first important word in the title, excluding *a*, *an*, and *the*.

In general, writings are listed under as many different subject-matter headings as possible. Assignment of writings to headings is based on the opinion of the editor and does not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any government agency.

II. AUTHOR INDEX

III. SUBJECT INDEX

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CONTRACTING OUT INDUSTRIAL TYPE ACTIVITIES (CITA)

DEATH TAXES

DISCRIMINATION, RACIAL

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V

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W

WITHHOLDING OF TAXES (new heading)

IV. TITLE INDEX

V. BOOK REVIEW INDEX

A. BOOK AUTHORS

B. BOOK TITLES AND REVIEW TITLES

By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:

J. C. PENNINGTON
Major General, United States Army
The Adjutant General

PINPOINT DISTRIBUTION:

Active Army: To be distributed to all active Army judge advocates and legal advisor offices.

ARNG & USAR: None.